88-85

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JOHN PILAROWSKI,

Petitioner,

- vs -

MACOMB COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTIONS PRESENTED

I.

WHETHER A COUNTY MAY BE HELD LIABLE FOR THE UNCONSTITUTIONAL DISCHARGE OF AN EMPLOYEE WHERE CERTAIN MEMBERS OF ITS LEGISLATIVE BODY ACTIVELY ORCHESTRATE A COURSE OF CONDUCT INTENDED TO EFFECTUATE THE UNCONSTITUTIONAL DISCHARGE OF THAT EMPLOYEE, AND WHERE THE ACTS NECESSARY TO THAT COURSE OF CONDUCT WERE APPROVED BY THE LEGISLATIVE BODY WITH KNOWLEDGE OF THE PURPOSE OF THAT COURSE OF CONDUCT?

II.

WHETHER PETITIONER INTRODUCED SUFFICIENT EVIDENCE TO WARRANT THE CONCLUSION THAT A MAJORITY OF THE MEMBERS OF THE LEGISLATIVE BODY WERE AWARE OF THE PURPOSE OF THE COURSE OF CONDUCT ACTIVELY ORCHESTRATED BY CERTAIN OF ITS MEMBERS?

PARTIES TO THE PROCEEDINGS

At trial and on appeal the case caption indicated that this action was against the Macomb County Health Department and the Macomb County Board of Commissioners. However, at trial the parties stipulated that the only actual defendant was Macomb County itself. The Court of Appeals noted that state of affairs in footnote one of its majority opinion in this case. Accordingly, Macomb County is listed in the caption of this pleading as the only Respondent.

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To the Honorable William H. Rehnquist,
Chief Justice of the United States,
and to the Honorable Associate Justices
of the United States Supreme Court:

Petitioner, John Pilarowski, respectfully prays that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered March 15, 1988, in this matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in this matter is reported at 841 F2d 1281 (1988), and is reproduced in the Appendix annexed to this Petition. (A-1). The reported opinion is an amended version of one filed December 21, 1987.[1]

The opinion of the District Court for the Eastern District of Michigan is unreported and is reproduced in the Appendix annexed to this Petition. (A-33).

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[1] The only amendment of the first opinion was the addition of footnote 6 at page 10. (A-10 – A-11).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued an opinion on December 21, 1987. (A-17). That same day the parties were notified by the clerk of that Court that a judgment had been entered in conformity with that opinion. On January 4, 1988, Petitioner filed a timely Petition for Rehearing En Banc. On March 15, 1988, the Court of Appeals issued an amended opinion (A-1) and entered a judgment in conformity therewith. (A-50). On April 12, 1988, the Court of Appeals entered an order denying rehearing. (A-51). This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE[2]

Petitioner filed this action claiming that Respondent terminated his employment because of Petitioner's exercise of his First Amendment right to write "letters to the editor" to the local newspapers concerning the operation of the Macomb County Government. The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1343.

In December, 1974, Petitioner wrote a "letter to the editor" of one of the local newspapers, the gist of which was to support his supervisors' request for additional public health nurses. (352). At the time, Petitioner had been employed for five years by the Macomb County Health Department in a supervisory position as an administrative assistant. (348).

Within a month of the aforementioned letter being published, Robert Verkuilen, the Chairman of the Board of Commissioners[3], summoned Petitioner to his office. (359). During a two-hour meeting, Mr. Verkuilen told Petitioner that the commissioners did not appreciate the "stupid garbage" he was writing to the newspapers, and that if he did not desist he would be disciplined "up to discharge". (359).

Petitioner did not desist because he viewed the commissioners' position as improper in that his status as a

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[2] The factual account herein presented is an abbreviated version of the Statement of Facts in Petitioner's Brief on Appeal to the Court of Appeals for the Sixth Circuit. Parenthetical references not preceded by "A" are to the Joint Appendix filed in that Court.

Because the predicate for the lower courts' decisions was that the evidence is to be viewed in the light most favorable to the Petitioner (A-7, A-35 – A-36), this account will give Petitioner the benefit of all evidentiary conflicts.

[3] The Board of Commissioners is the legislative body of Macomb County.

county employee did not strip him of his First Amendment right to free expression. (359-60). He did not write the letters in his capacity as a departmental employee, but rather as a private citizen concerned with public issues and county government. (360-61).[4] As a result, two months later he was summoned to a formal meeting of the Board of Commissioners. (358). The Board members discussed their displeasure with Petitioner's letter writing "at length" and asked him to stop. (217, 358, 524). Petitioner responded that he had a right to express his own opinion on his own time. (358). Following Petitioner's dismissal from the meeting, the minutes reflect the following:

> "Chairman Seguin asked if there were comments concerning Mr. Pilarowski's appearance before the Board.
>
> Mr. Walsh replied that there were no comments. I don't think we will bring the matter back to this Board — Dr. Brown is his employer."

(217).

On July 28, 1976, Dr. Brown, Petitioner's supervisor, told Petitioner that he was being terminated as the result of a letter that he had written to Chairman Verkuilen. (362, 523). Petitioner requested a hearing, which was eventually set for September 7, 1976. (364). In the interim, one of the commissioners raised the issue of Petitioner's termination at a Board meeting. (810). Commissioner Back moved to table the issue. (810). Later, Dr. Brown told Petitioner that he would have been running the Health Department if he had never written a "letter to the editor". (365, 528-29).

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[4] Throughout this entire litigation it has never been disputed that Petitioner's letter writing was protected conduct within the meaning of the First Amendment.

The Board of Health refused to reinstate Petitioner, whereupon he filed an action in state court seeking reinstatement, damages, and injunctive relief. The Macomb County Circuit Court dismissed the action. The Michigan Court of Appeals reversed and ordered the trial court to issue an injunction ordering Respondent[5] to continue Petitioner's salary and benefits. *Pilarowski* v *Brown*, 76 Mich App 666; 257 NW2d 211 (1977).[6] A month later, Petitioner settled with Respondent for reinstatement and back pay. (365-66).

Within three months of his return, both of his superiors in the Health Department resigned. (367, 520). As a result, Petitioner single-handedly administered the entire department for approximately one year. (367-68). During all of that time, he continued periodically writing his "letters to the editor" concerning county affairs.

In 1977, the Board of Commissioners created a bureaucracy called the Health Services Administration (hereinafter "HSA"), an umbrella agency which centralized the administration of the Health Department and the Mental Health Department. (381-82, 630-33). The Board appointed Norman Hill, a former Chairman of the Board of Commissioners, as the Director of HSA. (382, 611). The Board of Commissioners also created the position of Deputy Administrator of HSA, the responsibilities of which were those which Petitioner had been performing for more than a year. (368-69, 631-32). Petitioner applied for the position, but it was given to a Mr. Daniel Lafferty. (370-71).

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[5] The Board of Commissioners and the Health Department were also among the defendants in that action.

[6] A copy of that decision was introduced as an exhibit at trial.

Petitioner's letter writing continued. Mr. Lafferty discussed the letters with Mr. Hill (731-32), who had a staff person keeping a scrap book of Petitioner's letters as they were published (554-55, 757-58). During that time, a number of commissioners expressed "concerns" over the letters. (504, 805-09).

There followed in 1979 the successive creation of three more HSA positions, the job duties of which were taken from Petitioner and given to the new appointees. (379, 492, 629, 632, 787-90). Finally, all of the accounting and personnel employees who had worked for Petitioner were transferred to HSA. (535-38, 543).

In late 1979, Mr. Lafferty discussed Petitioner's 1976 firing with Dr. Brown, Petitioner's former supervisor, who suggested that Mr. Lafferty review the case material from that incident. (747).

In 1980, the Board of Commissioners created six new HSA administrative positions at a cost of almost $200,000. (779).

Meanwhile, as his job responsibilities were reassigned to other positions, Petitioner — who was qualified to run the entire Health Department (528-29) (and, in fact, had done so) — was denied access to any position other than the one that he had. (407-11, 416-21). Eventually, Petitioner's job description was revised to a non-supervisory one with the only non-directed responsibilities being "the processing of routine supply and equipment orders and the inventory and control of same" (244), i.e., counting pencils and paper.

In early 1981, Petitioner was on his union's bargaining committee with regard to the 1981-82 collective bargaining agreement. (567). Before any proposals were on the table, the County took the unusual position of insisting on a news blackout from the inception of

negotiations. (569-70). Chairman Verkuilen himself came to the bargaining table to insist that Petitioner write no letters during the entire negotiations, and he instructed Respondent's negotiators accordingly. (429).

During those negotiations, the County steadfastly refused to agree to an agency shop unless the position of Program Development Specialist was excluded from the bargaining unit. (428). That position was the one into which Petitioner could have "bumped" in the event of a layoff. (429, 573-75).

At the conclusion of a December 16, 1981, committee meeting *at which a majority of the commissioners were present*, Mr. Back, who had recently become Chairman, excused the secretary and asked her to close the door behind her. (500). In the course of conversation, Commissioner Grove said:

> "Mr. Hill [the Director of the HSA] ha[s] been in there for three years and he still hasn't gotten rid of Pilarowski."

(501). Chairman Back responded, "Well, things can be worked out" or "There are ways to do that". (502).

In August, 1982, in response to a request by Mr. Hill citing budgetary concerns,[7] the Board of Commissioners laid off two clinic dentists and three clinic dental assistants, terminated the County's arrangement with six independent contractor dentists, and laid off *one* administrator — Petitioner. (700, 717-18). The resolu-

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[7] Respondent's witness testified that the County anticipated budgetary problems as early as 1981. (692).

In fact, at the time of Petitioner's layoff, Respondent had a $9,000,000 carryover from the previous fiscal year, from which fund the Health Department had gotten extra money in the past. (780-81). Furthermore, the Health Department ended the 1982 fiscal year with a $212,000 *surplus*. (774).

tion did not identify the employees to be laid off. (710). The meeting at which that action took place lasted eight minutes. (326, 328, 745-46).

Petitioner was informed by letter that he was laid off effective September 14, 1982, for budgetary reasons. (262, 412). Despite Respondent's long standing policy of reviewing previous employees' qualifications when positions became available (265, 813-16), Mr. Lafferty told Petitioner at that time that he would not be recalled. (816).

Petitioner unsuccessfully applied for three positions subsequent to his layoff. (471-72). He was rejected for two positions on the ground that he did not meet the educational requirements. (425, 472-73). Petitioner interviewed for the third position (for which he was qualified), which was available as of October 1, 1982. (409-10, 755-56). Respondent then eliminated that position from the 1981-82 budget and reinstated it a year later, after Petitioner's seniority rights expired. (478-79, 491, 727-29, 743-44).

Following Petitioner's layoff, Chairman Back boasted that "he got rid of the whole department to get rid of him". (295-96).

Less than two months after Petitioner's layoff, Mr. Lafferty requested *administrative* help from the Board of Commissioners because the Health Department was short handed. ( ).[8] The following month, Mr. Hill left Respondent's employ, the HSA was abolished, and two administrative assistants were moved back to the Health Department. (704-06). Petitioner's position was never reconstituted. (719). There are now four or five

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[8] A typographical error caused this portion of Mr. Lafferty's testimony (Tr 9/19/85, p. 75) to be omitted from the Joint Appendix filed in the Court of Appeals.

people performing tasks that Petitioner performed prior to the HSA "reorganization". (548-49).

Petitioner filed this action in the United States District Court for the Eastern District of Michigan, Southern Division, on June 16, 1983. (1, 5). At the conclusion of an eight-day trial, the jury returned a unanimous verdict in the amount of $300,001. (836).[9] A Judgment on Jury Verdict was entered September 24, 1985. (A-42).

On October 4, 1985, Respondent filed a Motion for JNOV or Remittitur, renewing the argument that it had made for a directed verdict to the effect that there was insufficient evidence to warrant the conclusion that Petitioner had been fired pursuant to a County policy of suppressing constitutionally protected speech. (A-33). On April 9, 1986, the District Court issued an opinion and order granting judgment notwithstanding the verdict for Respondent. (A-33).

The District Court ruled that there *was* sufficient evidence to support the conclusions (1) that Petitioner would not have been fired but for his letter writing, and (2) that Respondent's contention that Petitioner had been laid off due to a budget deficit was pretextual. (A-37). However, the Court then ruled that Petitioner had failed to demonstrate any connection between his 1976 firing, Respondent's attempt to silence him during the 1981 collective bargaining negotiations, the systematic removal of his job responsibilities, the testimony concerning the commissioners' conversations and comments concerning Mr. Hill "getting rid of" Petitioner,

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[9] Petitioner requested $300,000. The Program Development Specialist position, which was eliminated from the bargaining unit during the 1981-82 contract negotiations, was placed by Respondent in a salary range $1.00 higher than Petitioner's position, with the result that he could not "bump" into it when he was laid off. (426).

and the testimony of two County employees that they were afraid of expressing themselves for fear of retaliation. (A-39 – A-40). The Court cited *Monell* v *Department of Social Services*, 436 U.S. 658 (1978), as requiring judgment notwithstanding the verdict in the circumstances. (A-37 – A-39).

The Court of Appeals affirmed, holding that the evidence was insufficient "to demonstrate that the County Board possessed the improper motive alleged when it approved the necessary budget cuts affecting the Health Department". (A-7). Chief Judge Lively dissented on the ground that the majority had misinterpreted *Monell:*

> "The district court misapplied *Monell* and its progeny in this case. Pilarowski was terminated pursuant to an action of the ultimate governing authority of Macomb County, its Board of Commissioners. There could be no doubt that this was an act of the County, not that of an employee. Liability did not depend upon a finding that the County had adopted a policy of suppressing free speech."

(A-15).[10]

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[10] Both the majority and dissenting opinions in the instant case also addresed an issue raised *sua sponte* by the Court of Appeals: the propriety of the District Court's denial of Respondent's Motion for Summary Judgment on the ground of collateral estoppel. (A-10 – A-13, A-16). The dispositive question on that issue is the preclusive effect (if any) that Michigan law would accord the September 28, 1984, Decision and Order of the Michigan Employment Relations Commission concerning Petitioner's discharge. *University of Tennessee* v *Elliott*, 478 U.S. 788 (1986). The dissent would have remanded the case for reconsideration of that issue; the majority would have done so had it not upheld the judgment notwithstanding the verdict.

Petitioner does not premise his Petition for Certiorari on that issue, nor does he think it advisable for this Court to address it in the present posture of this case. The issue is entirely governed by state law, which, as the Court of Appeals implicitly recognized, has not yet been fully considered by the District Court.

REASONS FOR ALLOWANCE OF THE WRIT

The importance of the constitutional right violated in this case is self-evident. The right of a citizen to comment upon and to criticize his government is perhaps the most fundamental prerogative in a democratic political system. At issue here is the showing necessary to hold a local government accountable for retaliation against a citizen who exercises that right.

Petitioner's theory of liability against Respondent is that its Board of Commissioners deliberately retaliated against him for his exercise of his First Amendment rights to criticize the County government, i.e., the Board. When its first attempt to punish Petitioner by discharging him[11] was undone by the Michigan Court of Appeals because of the patency of Respondent's unconstitutional motivation, the Board of Commissioners set about achieving its goal with much greater circumspection.

Following Petitioner's reinstatement, the Board instituted a series of organizational and personnel changes designed to systematically strip Petitioner of virtually all of his job duties, the purpose being either to humiliate him into quitting or to leave him vulnerable to layoff when any budget cuts were made. The Board also saw to it that the position into which Petitioner could "bump" in the event of a layoff was removed from the collective bargaining unit and placed into a classification higher than Petitioner's, thereby rendering it unavailable to Petitioner in the event of a layoff. Once that was accomplished, Petitioner's discharge

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[11] There is no dispute but that the approval of the Board of Commissioners was required for all organizational and personnel changes. (Plaintiff-Appellant's Brief on Appeal at 32; Plaintiff-Appellant's Brief on Appeal at 47-48).

could be accomplished any time the Board chose to cut the Health Department budget.

The Board accomplished all of that, of course, without adopting a formal resolution that it was engaged in a course of conduct intended to punish Petitioner for his First Amendment activity. It is the absence of that formal declaration that was actually (and necessarily) the basis for the lower courts' dispositions of this case. The trial court found that there was sufficient evidence to warrant the jury's (necessary) finding that Petitioner would not have been fired but for his letter writing and that Respondent's contention that Petitioner's layoff was due to a budget deficit was pretextual. However, the trial court found that there was insufficient evidence of the Board's improper motive when it approved the budget cut. The Court of Appeals affirmed that finding.

Two questions are presented here. The first is whether a municipality can be held liable under 42 U.S.C. 1983 for a course of conduct orchestrated by certain members of its legislative body and executed by a series of actions formally approved by that body with knowledge by its members of the nefarious purpose of that course of conduct. The second question is whether Respondent introduced sufficient evidence to establish the existence of the scheme and of the legislative body's knowledge of it.

Argument

WHETHER FORMAL ACKNOWLEDGEMENT BY A MUNICIPALITY'S LEGISLATIVE BODY OF ITS ILLEGAL MOTIVE FOR DISCHARGING AN EMPLOYEE IS A PRECONDITION FOR MUNICIPAL LIABILITY UNDER 42 U.S.C. 1983 IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

Review of the record, the lower courts' decisions, and Defendant's Brief on Appeal below will remove any doubt as to whether the Court of Appeals decision actually imposed the above-described requirement on Petitioner's cause of action. That can be done most quickly by pointing to the *non-circumstantial* evidence which the lower courts held insufficient to support recovery against Respondent:

(1) The displeasure and threats expressed by Chairman Verkuilen (375) and the Board itself (217, 358, 524) in 1975 as the result of Petitioner's letter writing.

(2) The discharge of Petitioner in 1976 because of his letter writing.

(3) The December, 1981, pre-layoff discussion between Commissioner Grove and Chairman Back, in front of a *majority* of the Board of Commissioners (500), that the HSA Director "still hasn't gotten rid of Pilarowski" and the response that "there are ways to work this out". (501).

(4) Chairman Back's post-layoff boast that he had gotten rid of the whole department in order to get rid of Petitioner. (295-96).

Respondent's response in the Court of Appeals was that the statements of those individual commissioners are of no evidentiary value because statements by indi-

vidual commissioners are not binding on the entire Board, which can act only through a majority of its members. (Defendant-Appellee's Brief on Appeal at 40-41). The Court of Appeals accepted that argument, limiting the probative value of the evidence to no more than the proposition that certain individual commissioners may have acted with improper animus. (A-7 – A-8).

Furthermore, the Court of Appeals limited its view of the Board's action to nothing other than the Board's vote on the budget reduction. It gave no evidentiary value whatsoever to the course of conduct which preceded it, or to the evidence supporting the proposition that a majority of the Board was aware of that course of action and its purpose.

In light of all of that, it is beyond cavil that it was the absence of a formal resolution approved by a majority of the Board acknowledging its illegal intent which, in the opinion of the lower courts, doomed Petitioner's cause of action against Respondent.

The importance of the issue presented derives from both the nature of the underlying constitutional right and from the import of this Court's recent decisions concerning the application of *Monell* with regard to the identification of "policymakers" and the kind of action by such entities which will give rise to municipal liability.

The importance of the particular species of First Amendment conduct involved here was recently noted by the Second Circuit:

> "As Thomas Emerson, the First Amendment scholar noted, free speech is most valuable when it relates to the exigencies of the time. T. Emerson, the System of Freedom of Expression (1970).

> Issues of . . . governmental decisions made in 'smoke-filled' rooms are topical concerns in our society. Speech regarding these issues functions as a 'check' upon the abuses by government. Moreover, it is in line with the greatest American traditions, practiced by distinguished libertarians from Adams to Whitman, to inform the public of inequities."

Donahue v *Windsor Locks Board of Fire Commissioners* 834 F2d 54, 58 (2nd Cir 1987). It is self-evident that there can be no more dangerous violations of First Amendment rights than those of a government attempting to silence its critics.

Such violations are even more pernicious when effected by the power of a government which denies that it is guilty of them. The reason is that until the government itself is held responsible for its actions, there is relatively little incentive for it to change its conduct because the responsible policymakers can avoid the electoral consequences of their actions by pointing to a judicial determination that they were not responsible. Furthermore, imposing liability solely on the agents who carry out the government's policy misses the mark in terms of placing the consequences of such policies where they belong. *Cf. Owen* v *City of Independence*, 445 U.S. 622, 652 (1980).

The problem, then, is the imposition of liability upon government "policymakers" who effectuate unconstitutional retaliation without acknowledging it by way of formal admission. The problem is complicated where, as here, the only government "policymaker" is a board, which acts formally only through a public vote of the majority of its members. *See, e.g., National Association of Greeting Card Publishers* v *United States Postal*

Service, 569 F2d 570, 600-01 n. 137 (DC Cir 1976), *vacated on other grounds*, 434 U.S. 989 (1977).

In the context of this Court's decisions, the issue is sharpened by the definition of "policymaker" for purposes of *Monell*. Most recently, a plurality of this Court held that the identity of a "policymaker" is a question of law governed by state law. *City of St. Louis* v *Praprotnik*, __ U.S. __, 108 S.Ct. 915 (1988) (O'Connor, J.). In so holding, the plurality rejected the concept of a *de facto* "policymaker" whose status turns upon the practical finality of his decisions. *Id.* As the concurring opinion pointed out, the effect of such a definition reduces the scope of a municipality's liability to that for the acts of a relatively small number of potential "policymakers." *Id.* (Brennan, J.).

Assuming that the *Praprotnik* plurality opinion represents the emerging rule, the presumed elimination of a considerable number of persons as "policymakers" will necessarily increase the focus upon and importance of the next question: which actions of a "policymaker" will give rise to municipal liability?

The lack of clarity in this Court's decisions on that point is the product of two facially conflicting themes of this Court's decisions following *Monell*.

On one hand, this Court has spoken of municipal liability in terms of the "official" acts or policies of its policymakers. *Monell*, 436 U.S. at 685, 690-91; *Pembaur* v *City of Cincinnati*, 475 U.S. 469, 480, 481 (1986); *Praprotnik*, 108 S.Ct. at 929.

On the other hand, this Court has recognized that municipal liability can result from "customs and usages" which have *not* received formal approval through the policymaking body's official decision-

making channels. *Monell*, 436 U.S. at 691; *Praprotnik*, 108 S.Ct. at 926, 927.

Overlaid on the language concerning "unofficial" "customs and usages" is the plurality holding in *Pembaur*, apparently approved in *Praprotnik*, that a single decision by a "policymaker" can constitute the basis for municipal liability. Given that the "acts" involved in the instant case were undoubtedly the "acts" of Respondent (because only the Board could actually effect the organizational and personnel actions taken), and assuming that the "decision" involved was to undertake the above-described course of conduct for the purpose of punishing Petitioner for his letter writing, the question is whether a municipality is insulated from liability for a "decision" of its "policymaker" simply because the "policymaker" refuses to admit formally the illegal intent behind the course of conduct involved.

A relatively recent District Court decision recognized the problem posed by this Court's opinions and suggested a method of harmonizing the apparent tension therein:

> "The obvious tendency of these formulations [in *Monell*, *Pembaur*, and *Owen* v *City of Independence*, 445 U.S. 622 (1980)], endorsed by what amounts to a majority of the justices, is to treat as actionable under § 1983 only those policies made up of specific, concrete actions taken with some thought.
>
> While this view is consistent with the Court's policy of carefully limiting liability to a municipality's 'own', and actual, misconduct, it is at odds with another theme of Supreme Court

> analysis: that the term 'policy' is not restricted to formal or elaborate plans and declarations."
>
> * * * *
>
> "These two lines of analysis — one calling for a conscious or deliberate choice, the other permitting an unstated or customary practice — are not necessarily incompatible. They can be reconciled by insuring that the 'custom or usage' is unambiguously established by official policymakers' *conduct* and is not simply suggested by isolated actions of some employee."

Woodley v *Town of Nantucket*, 645 F Supp 1365, 1378 (D Mass 1986) (emphasis added).

Thus, the problem should be analyzed not in purely formalistic terms of "official" promulgation, but rather in terms of the type of conduct sufficient to warrant a legitimate inference of the policymaker's approval or ratification, formal or otherwise.

A number of federal decisions have confronted situations similar to the one presented here and have reached results inconsistent with that reached by the Court of Appeals in the instant case.

First, federal courts have ruled that liability can be imposed on a municipality on the basis of a "policymaker's" decision even where the decision has *not* been formally promulgated. *Steele* v *Van Buren Public School District*, 845 F2d 1492 (8th Cir 1988) (policymaker's tacit approval of employee's conduct sufficient); *Fuchilla* v *Prockop*, 682 F Supp 247 (DNJ 1987) (single act of agent can be "custom" in absence of formal approval by policymaker); *Canada* v *Pagendale*, 635 F Supp 376 (ED Mo 1986) (direct but non-formal involvement of city counsel sufficient). *See Kirschling* v *Lake*

Forest School District, ___ F Supp ___ (D Del 1988) (fact question whether agent acting on instructions from school board).

Second, the Seventh Circuit has upheld a jury verdict against a city in the absence of a formally promulgated policy, holding that the comments of *one* of three members of the Board of Fire and Police Commissioners constituted sufficient evidence upon which to premise a finding of the requisite discriminatory intent on the part of the (policymaking) Board. *Webb* v *City of Chester*, 813 F2d 824 (7th Cir 1986).

There is a consistent line of passages from this Court's successive opinions in this area which appear to provide support for the reasoning and the results in the aforementioned decisions. Those passages demonstrate that this Court has always recognized that a governmental unit can effect violations of constitutional rights in an informal manner; liability cannot be avoided merely by the artifice of denying any *formal* action.

> "Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 'person', by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' *even though such custom has not received formal approval* through the body's official decision making channels."

Monell, 436 U.S. at 690-91 (emphasis added).

> "As the facts developed, there was no affirmative link between the occurrence of the various inci-

> dents of police conduct and *the adoption of any plan* or policy by petitioners — *express or otherwise* — showing their authorization or approval of such misconduct."

Rizzo v *Goode*, 423 U.S. 362, 371 (1976) (emphasis added).

> "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. *If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality* because their decision is final."
>
> * * * *
>
> "Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy . . . . It would be a different matter if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker. *It would also be a different matter if a series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware.*"

Praprotnik, 108 S.Ct. at 926, 927 (first emphasis in original) (second emphasis added).

Those passages are consistent with the frequently cited Fifth Circuit *en banc* opinion in *Bennett* v *City of Slidell*, 728 F2d 762 (5th Cir 1984):

> "The council may violate rights of people by direct orders or by setting a course of action for city employees which, when followed by city employees, interferes with someone's rights. *The council may set a course of action* by its own promulgation or *by the acceptance of a course* set or *conducted by city employees.* In any event the course of conduct, *whether formally declared or informally accepted,* must be the policy of the city government if it is to be the basis of city liability."

Id. at 767 (emphasis added).

The situation in the instant case is that a course of conduct was conceived and directed by at least certain identified members of the Board of Commissioners to "get rid of" Petitioner by removing all of his job responsibilities. Even the majority opinion in the Court of Appeals recognized that the evidence was sufficient to warrant that conclusion.

However, the Court of Appeals failed to acknowledge the direct evidence demonstrating that at least a majority of the Board of Commissioners actually knew of the plan, and the quantity of circumstantial evidence demonstrating that all of the members of the Board "must have been aware" of what was occurring and why, *Praprotnik*, 108 S.Ct. at 927, and "accept[ed] [the] course . . . conducted by city employees", *Bennett*, *supra* at 767.[12]

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[12] The reason for the majority's failure in that regard was its insistence on characterizing the "policy action" as consisting only

(*concluded on page 23*)

The point is that in circumstances such as obtained here — where there was sufficient evidence from which to infer the knowledge of the Board members concerning the effect and purpose of the personnel and organizational changes they were approving — there should be no distinction drawn between those Board members who actively instigated the course of conduct and those who acquiesced in it with knowledge of its purpose. To hold otherwise would impose upon individual citizens an impossible burden of proof in the context of non-formal and unadmitted illegal governmental retaliation by a legislative or administrative body of any sort. (In fact, it would virtually eliminate any possibility of recovery in such circumstances.) Compare *Webb* v *City of Chester, supra.*

Without elaborating on what has been set forth in the Statement of the Case, *supra,* Petitioner submits that if the absence of a *formally promulgated* County policy to suppress free speech is not a bar to his claim, then he has presented the most compelling package of circumstantial *and* non-circumstantial evidence of illegal intent by a board that this Court is likely to see in the context of unformalized governmental retaliation. That being so, this case is an almost ideal vehicle for more clearly defining the parameters of the *Monell* rule in the context of non-formalized conduct by a "policymaker".

First, there is no question whether Petitioner's activity was conduct protected by the First Amendment. That eliminates one area of contention.

(*continued from page 22*)

of the vote "to reduce the budget without *specific* reference to plaintiff" (A-6) (emphasis added). By adopting that perspective, the Court chose to ignore the Board's "course of conduct" of eliminating Petitioner's job responsibilities and the admissions of certain Board members concerning the motivation behind that conduct.

Second, there is no question but that the target of Petitioner's case was the Board of Commissioners.[13] There is, therefore, no issue as to whether this case involved the actions of a "policymaker", which eliminates another frequently litigated issue.

Third, in light of the jury's verdict and the trial court's opinion, there is no question concerning the causal relationship between Petitioner's protected conduct and his discharge under the test promulgated in *Mount Healthy City Board of Education* v *Doyle*, 429 U.S. 274 (1977). That eliminates yet another frequent area of disagreement.

All of that leaves one focused legal issue: whether the illegal conduct here involved can be ascribed to the County Board of Commissioners in the absence of a *formally promulgated* policy. That issue is the area of *Monell*'s development which most logically follows next from this Court's most recent decision.

Moreover, this case presents that issue in the context of an underlying constitutional right of such undoubted monumental significance as to pose the issue in its starkest terms. Perhaps none of the panoply of constitutional rights underlying section 1983 cases is of greater systemic significance than the one involved here. If municipalities can act with impunity in the manner demonstrated by the eight days of evidence in this case, this Court should make that clear. In the meantime, the absence of a definitive ruling on that point and the existence of the instant case as the law of the Sixth Circuit are certain to have a chilling effect on anyone who, like Petitioner, is sufficiently interested in the operation of his local government to wish to speak out.[14]

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[13] The jury was instructed that the "policy" necessary for recovery had to be that of the County, which is made by its lawmakers, and that it was *not* enough that Petitioner prove that "certain individual members" of the Board took action against him. (A-52 – A-54).

[14] In this case, two witnesses testified that they were afraid of expressing certain opinions concerning County government for fear of retaliation.

CONCLUSION

For the foregoing reasons Petitioner requests this Court to grant a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: July 8, 1988

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No. _____

In The

Supreme Court of the United States

October Term, 1988

JOHN PILAROWSKI,

Petitioner,

-vs-

MACOMB COUNTY,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed March 15, 1988)

(JOHN PILAROWSKI, Plaintiff-Appellant, v. MACOMB COUNTY HEALTH DEPT. and MACOMB COUNTY BOARD OF COMMISSIONERS, Defendants-Appellees — No. 86-1423; ON APPEAL from the United States District Court for the Eastern District of Michigan)

Before: LIVELY, Chief Judge,
WELLFORD, Circuit Judge,
and CELEBREZZE, Senior Circuit Judge.

WELLFORD, Circuit Judge, delivered the opinion of the court, in which CELEBREZZE, Senior Circuit Judge, joined. LIVELY, Chief Judge, (pp. 13-16)* delivered a seperate dissenting opinion.

WELLFORD, Circuit Judge.

This is an employment discrimination case, brought pursuant to 42 U.S.C. § 1983, in which plaintiff claimed he was discharged for exercising his First Amendment right to freedom of speech. The jury returned a verdict in favor of plaintiff, but the district court set the verdict aside and entered judgment for the defendants.[1] In granting judgment notwithstanding the verdict, the district court found that plaintiff had failed to prove that his discharge was based on an unconstitutional custom or policy of suppressing free speech. Before submitting the case to the jury, however, the

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* [*Printer's Note*]: *Cf.* pp. A-13 – A-16, *infra.*

[1] The parties stipulated that Macomb County is actually the only defendant. (See plaintiff's brief, footnote one.)

district court denied the defendants' motion for summary judgment. Defendants maintained in the motion for summary judgment that an administrative adjudication of the Michigan Employment Relations Commission precluded further inquiry into the reasons for Pilarowski's discharge under collateral estoppel principles.

I.

Some five years after being employed as an administrative assistant in the Macomb County Health Department, plaintiff began writing "letters to the editor," which were published in several local newspapers. Many of the letters were critical of actions taken by the Macomb County Board of Commissioners, the governing body of the county which controlled the health department funding. In January 1975 Dr. Leland Brown, Pilarowski's immediate supervisor, advised him to stop writing the critical letters to the papers, but Pilarowski continued to do so. On July 28, 1976, Dr. Brown discharged plaintiff for writing the letters. Plaintiff brought suit in state court and ultimately was ordered reinstated with back pay and benefits. *Pilarowski* v. *Brown*, 76 Mich. App. 666, 257 N.W.2d 211 (1977). After plaintiff returned to work, Dr. Brown resigned. Plaintiff continued sending faultfinding letters to the newspapers.

After his reinstatement plaintiff apparently assumed additional responsibilities under a series of temporary administrators of the health department. In 1978 the State of Michigan enacted a new public health code that required an extensive restructuring of the health services in Macomb County. M.C.L.A. 333.1101 *et seq.* The new code made significant changes in the method and amount of state funding for the county health department, requiring Macomb County to fund large portions of its health-related expenditures that formerly

had been provided by automatic state disbursements. In January 1978 Macomb County created an umbrella agency, Health Services Administration (HSA), to centralize administration of both the county health department and its department of mental health. In creating HSA the county sought to strengthen administrative resources of the health department generally, and to provide the means for compliance with additional reporting requirements of the new code. Plaintiff was an unsuccessful applicant for the position of director of HSA. Over the next four years several new administrative positions were created within HSA and filled by persons other than Pilarowski. At trial, plaintiff contended that some of these positions were created to reduce his responsibilities. Plaintiff continued to write the same type of letters to the editor during this period of transition.

In 1981 plaintiff was a member of his union's bargaining committee as the union and the county worked on a collective bargaining agreement. The county contended that there was an agreement for a news blackout during negotiations, and that plaintiff violated the blackout by publishing another letter to the editor. Plaintiff maintained that there had been no such agreement at the time of the publication and that the county's negotiator had attempted to impose the blackout for the sole purpose of stopping his letter writing.

One of the Commissioners, Dilber, testified that a considerable time after the labor negotiations had concluded in December of 1981, he overheard an informal discussion between two other Commissioners, Beck [*sic*, Back] and Grove, (the only discussion he had ever heard concerning Pilarowski) indicating that the Health Department "hasn't gotten rid of Pilarowski yet," but "there were ways to work this out." Both Beck and Grove denied that such a conversation ever took place.

In August 1982 the director of HSA proposed several reductions in staff to avoid a projected budget deficit in the Department of Health. If it occurred, such a deficit would violate state law, and the Health Department had exhausted its reserve of general funds. The Macomb County Board of Commissioners adopted the director's recommendation for a reduction in the budget, necessitating lay-offs.

The Health Department was not the only branch of county government at the time affected by the budget crisis and the need for reduction in staff. During the prior year (1981-1982) 32 positions were eliminated in the Health Department. In August of 1982 by a vote of 16 to 9, the Commissioners adopted a revised budget whereby a number of Health Department positions were designated for lay-offs.[2] No names of any specific individuals in the department were mentioned in the motion to adopt an amended budget that would require lay-offs in the Health Department. Plaintiff was the only administrator in the Health Department subjected to this lay-off; the other affected employees were dentists and dental assistants. The budgetary action of the Commissioners, however, did not name Pilarowski as a person to be eliminated by reason of the reduction in force.

Within a few months after Pilarowski was terminated, HSA was abolished, and "plaintiff's position was never reconstituted . . . four or five people [are now] performing the tasks" which in whole or a [*sic*] part had been assigned to plaintiff. (Plaintiff's brief, p. 15). Before commencing the present action in district court plaintiff appealed his discharge to the Michigan Employ-

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[2] Commissioner Dilber (plaintiff's witness) voted for the budget adjustment and consequent lay-off requirement. Commissioner Grove voted against the reduction.

ment Relations Committee (MERC). Following a hearing, MERC rendered a decision finding that plaintiff was not terminated because of his union activities, and noted that the county had shown legitimate budgetary concerns as a basis of its actions. Among other findings, the administrative law judge found that "[t]he record establishes that there was a need for economy on the part of the County . . . an absence of evidence of animosity towards [Plaintiff] . . . the elimination of [Plaintiff's position] was the result of County reorganization . . . [and] it is inconceivable that the County Board of Commissioners undertook extensive reorganization . . . as a pretext in order to eliminate [Plaintiff]." Plaintiff did not challenge the findings of the ALJ or appeal the MERC decision to the Michigan state courts as he was permitted to do under Michigan procedure.

In addition, plaintiff grieved his discharge under provisions of the collective bargaining agreement with Macomb County. The arbitrator found that the economic reasons given for plaintiff's discharge were authentic and reasonable and that there was no evidence to support Pilarowski's claim that he was terminated for exercising his First Amendment rights. At the arbitration hearing the argument presented by plaintiff was that he had been intentionally discharged through a "concerted effort by the Employer to get rid of him *for his letter writing* and union activity." J/A 297. Proof of both activities, including the alleged brief discussion between Commissioner Beck and Commissioner Grove about getting rid of Pilarowski more than a year and a half before the termination occurred, was presented to the arbitrator. The collateral estoppel argument presented by defendants rested on their claim that the unappealed MERC decision precluded further litigation with respect to the good cause basis for plaintiff's discharge, and that this was further supported by the find-

ings of the arbitrator that there was good cause for the discharge not related to Pilarowski's letter writing and statements made during prior labor negotiations.

II.

Whether or not we adopt defendants' argument that plaintiff should be collaterally estopped from pursuing his claim of an improper discharge because of his letter writing activities, we find (as did MERC and the arbitrator) that the proof in this case is insufficient to establish that plaintiff's First Amendment activities were established as a cause of his termination by the Macomb County Commissioners. Assuming that the alleged conversation did in fact take place between Beck and Grove, two of the twenty-five commissioners, more than a year and a half before the termination took place, there is uncontradicted proof that budget constraints and cutbacks were necessary and mandated in the Health Department and many other departments of Macomb County in August of 1982, and that the Commissioners took budgetary action without specific reference to the individuals who would be affected by the necessary budget reductions. One of the two commissioners alleged to be attempting to "get rid" of plaintiff voted against the reduction ordered. The policy action taken by the County Board of Commissioners, then, was to reduce the budget without specific reference to plaintiff. In order for the Board of Commissioners to be liable for the discharge, plaintiff must present credible proof that the decision to discharge him was made "by reason of his exercise of constitutionally protected First Amendment freedoms." *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 283-84 (1977); *see also Perry* v. *Sindermann*, 408 U.S. 593, 597-98 (1972). Plaintiff must, indeed, go further and carry the burden to establish that his "conduct was a 'substantial factor'

— or, to put it in other words, that it was a 'motivating factor' in the Board's decision. . . ." *Mt. Healthy*, 429 U.S. at 287 (footnote omitted). We are satisfied that the record fails to support plaintiff's contention as to the causation factor in this case with respect to the County Board's decision. Pilarowski's evidence, given a favorable construction, was insufficient to demonstrate that the County Board possessed the improper motive alleged when it approved the necessary budget cuts affecting the Health Department.[3]

The Supreme Court has determined that a local government may not be held liable under § 1983 based upon a *respondeat superior* theory simply for having an employee or employees who may commit a wrong. *See Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 691 (1978). We accordingly conclude that the district court was not in error in granting defendant's motion for judgment notwithstanding the jury verdict. We reach this conclusion after reviewing the evidence in the light most favorable to the plaintiff, including the evidence of the previous successful state court suit brought by Pilarowski against the County, his failure to attain promotions, removal or reassignment of some of his job responsibilities, and the proof concerning alleged adverse feelings and expressions of several Macomb County officials directed against plaintiff.

The district court found that plaintiff had presented proof that "certain individuals who were not named as

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[3] It may be, although it is not necessary for us to decide this issue, that certain individuals associated with defendant Macomb County may have acted with the requisite improper animus with respect to Pilarowski's termination. Plaintiff's evidence was insufficient to establish, however, that Health Department officials Hill and/or Lafferty were acting as employment policymakers for Macomb County. *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 483 n. 12 (1986).

defendants" may have been motivated to terminate his employment by reason of his letter writing activities, but that they had not been the policymakers who might bind the defendant County by reason of their actions under *Monell.*[4] The district court also cited *Bennett* v. *City of Slidell*, 728 F.2d 762, 767 (5th Cir.), *reh'g denied*, 735 F.2d 861 (1984), *cert. denied*, 472 U.S. 1016 (1985), in support of this ruling that the injury suffered (the termination) was not shown to be "fairly attributable to the government itself," and that Macomb County could not be held liable under "a *respondeat superior* theory of liability." He concluded that it had not been demonstrated by the plaintiff that the commissioners, who were the County policymaking body, had delegated to any employee in the Health Department such authority with respect to termination of any given individual within that department, including Pilarowski.

We find no error in this aspect of the district court's decision, which we interpret to hold that evidence of action taken by an individual non-policymaking supervisor (not a defendant) was not to be considered the act of the defendant in this case. Pilarowski thus was held to have failed to establish the requisite causal link between his First Amendment activities and the action taken by the named defendant, the Macomb County Board of Commissioners. See *Mt. Healthy, supra*, and *Monell, supra*. In our view the record does not support the claim that defendant Board used the budget cuts as a subterfuge to violate Pilarowski's constitutional rights.

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[4] "Some individual Macomb County employees," the district court found, "were offended by Mr. Pilarowski's letter writing activities and seemingly sought to have his employment with the Health Department terminated."

Even if the district court's decision were properly interpreted, as indicated by the dissent, to suggest that there was sufficient evidence to support a conclusion that defendant Board, not unnamed individuals within the Health Department, placed plaintiff on indefinite lay-off on a pretextual basis, a different result would not be mandated. In our view, the dissent's interpretation is not the correct one,[5] but we would affirm the judgment notwithstanding the verdict even if we were to accept that interpretation. As previously indicated, we find that the record simply is insufficient to support a conclusion that *the Board's action* in question in adopting budget cuts was motivated by Pilarowski's letter writing activity, or that a desire to "get rid" of him was a substantial factor or a causative factor in the Board's decision.

> If a lower court's judgment is proper, this court can affirm, even if the court's decision was based upon an incorrect application of law. *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 n. 6 (1970); *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937).

United States v. *Bank of Celina*, No. 85-5050, slip op. at n. 5 (6th Cir. Feb. 25, 1986), disposition noted at 786 F.2d 1166 (1986). *See also Stelos Co.* v. *Hosiery Motor-*

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[5] The district court concluded, among other things:

> Having carefully examined this evidence, the Court finds that as a matter of law, it is insufficient to establish liability as against the County of Macomb. The plaintiff simply *failed to demonstrate any connection* between these events [firing in 1976; seeking to "silence" him; diminishing job responsibilities; and the Back-Grove December, 1971, discussion] and the Court is unwilling to assume such a relationship.

(Emphasis added). The district court also pointed out the "*unrelated actions* of a limited number of individual employees" in denying *respondeat superior* liability against the County. (Emphasis added).

Mend Corp., 295 U.S. 237 (1935). *See Neely* v. *Martin K. Eby Const. Co.*, 386 U.S. 317 (1967); *Howes* v. *Great Lakes Press Corp.*, 679 F.2d 1023, 1029 (2d Cir.), *cert. denied*, 459 U.S. 1038 (1982); *cf. Cansler* v. *Grove Manufacturing Co.*, 826 F.2d 1507 (6th Cir. 1987), as to this court's authority to direct or to approve granting of JNOV.

III.

We therefore find no error in the reversal of the jury verdict for insufficiency of proof with respect to the motivating cause of the budgetary cutback affecting Pilarowski. Furthermore, while we do not find it necessary to decide the collateral estoppel issue raised by defendants, we are persuaded that defendants' argument in this respect has considerable merit.

Plaintiff, in the process of presenting his charge to MERC that defendants were guilty of a violation of the employment agreement, presented evidence of claimed hostility towards him and that the budget crisis and reorganization of the Health Department constituted a pretextual basis for his discharge. The ALJ found in considering plaintiff's charge of wrongful termination that there was a genuine economic necessity for cutbacks and an "absence of animosity" towards Pilarowski. Plaintiff did not appeal this administrative finding under the MERC process. The findings that no contractual violation occurred, that just cause for Pilarowski's discharge existed, and that the discharge did nor arise out of animosity, being unappealed, may establish a basis for the preclusive effect of such a decision. *See Senior Accountants, Analysts & Appraisers Association* v. *City of Detroit*, 399 Mich. 449, 458, 249 N.W.2d 121, 124-25 (1976).[6]

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[6] Plaintiff cites *Walker* v. *Wolverine Fabricating & Manufacturing Co.*, 425 Mich. 586, 391 N.W. 2d 296 (1986), for the proposi-

(*concluded on page A-11*)

In addition, plaintiff filed a grievance over his discharge and pursued it to arbitration. Here again, in arbitration plaintiff went into his letter writing proclivity, his feeling that county officials resented this activity and were therefore hostile towards him, and that this hostility brought about an improper discharge based upon exercise of his constitutional rights. The arbitrator characterized plaintiff's claim as being that his "layoff was discriminatory and punitive" by reason of the exercise of his freedom to make public his criticism of Macomb County officials and their policies. J/A 295. He relied upon the Dilber proof as well as the proof about animosity due to his union activity, which was the same proof presented to the jury in this case. Pilarowski relied on a claim of retaliation in his claim before the arbitrator. Defendants' position was that plaintiff had failed to prove that his layoff "was improper."

The arbitrator assumed that plaintiff's contentions about hostility may have had some basis, stating that "[f]rom the nature and extensiveness of the Grievant's letter-writing alone, it must be assumed that there was at least some level of negative feelings toward him in some quarters of the County administration." He decided, however, as we have concluded, that there was no "persuasive evidence" of "association," no causation demonstrated between any "negative feelings" toward Pilarowski and his layoff. While the arbitrator's deci-

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(*continued from page A-10*)

tion that collateral estoppel may not be accorded agency decisions such as that of MERC, in cases of this nature. *Walker*, however, was concerned with the nature of a Michigan circuit court's statutory review function and did not involve collateral estoppel effects of MERC proceedings. The MERC decision in this case held that plaintiff was not discharged for union activities or for animosity related to his union activities. We did not render our decision in the instant case based upon application of collateral estoppel principles in any event, but indicated a remand may have been indicated.

sion may not constitute a bar to plaintiff's raising similar issues under § 1983, it strongly corroborates the state MERC decision, adverse to Pilarowski, which held the lay-off to be a justified action.

The collateral estoppel issue is properly before us even though defendants did not file a cross-appeal. They raised the issue in their motion for summary judgment and it may present an alternative ground in support of the district court judgment. *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435-36 (1924).

In denying the defendants' collateral estoppel-based motion for summary judgment, the district court relied principally on our decision in *Elliott* v. *University of Tennessee*, 766 F.2d 982 (6th Cir. 1985). In *Elliott* we held that unreviewed state administrative determinations should not be given a preclusive effect in subsequent § 1983 actions. The Supreme Court reversed this holding in *University of Tennessee* v. *Elliott*, 478 U.S. 788, 106 S. Ct. 3220 (1986). Although agreeing that unreviewed state administrative determinations do not preclude a trial de novo of Title VII claims in federal court, the Supreme Court concluded that such determinations may preclude a second trial of the same issues in federal court where the claims are based on the Reconstruction of Civil rights statutes, including § 1983. Resolution of this issue turns on the preclusive effect to which the determination would be entitled in the appropriate state courts. 106 S. Ct. at 3225-27.

The district court recognized that the Michigan Supreme Court had held in *Senior Accountants, Analysts & Appraisers Association* v. *City of Detroit*, 399 Mich. 449, 249 N.W.2d 121 (1976), that unreviewed factual determinations by MERC are entitled to preclusive effect when an action in a state court rests on the same

questions of fact. However, the district court felt that this court's *Elliott* decision required a different rule when the subsequent action is brought in federal court.

The district court did not have the benefit of the Supreme Court's decision in *Elliott* or the decision in *Polk* v. *Yellow Freight System, Inc.*, 801 F.2d 190 (6th Cir. 1986), when it denied the defendants' motion for summary judgment. In *Polk* we ruled that federal courts must apply *Senior Accountants* and other Michigan cases dealing with collateral estoppel-based preclusion. *Id.* at 193-94.

Had we not decided that the grant of judgment notwithstanding the verdict was warranted for the reasons heretofore stated, we would have been called upon to effect a remand so that the district court might have reconsidered the collateral estoppel issue in light of the authorities and reasons set herein set out.

We AFFIRM the judgment of the district court for defendants.

LIVELY, Chief Judge, dissenting.

Since I believe the majority has seriously misapplied an important rule of law, I respectfully dissent.

A.

The majority concludes that there was insufficient evidence that Pilarowski's "First Amendment activities were established as a cause of his termination by the Macomb County Commissioners." *Ante* p. [A-6 *]. However, that was not the basis of the district court's granting the defendants' motion for judgment notwith-

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* *[Printer's insertion]*.

standing the verdict. The district court specifically found that there was sufficient evidence "to support the conclusion that defendants' argument that plaintiff was placed on indefinite layoff due to a budget deficit was pretextual and that plaintiff would not have been fired but for his letter writing activities." Joint Appendix at 209E. The motion for judgment notwithstanding the verdict was granted because the plaintiff chose to sue only the county rather than individual members of the Board of Commissioners or Health Department and, in doing so, failed to "identify the existence of a governmental policy and connect that policy to the particular injuries which he suffered." *Id.* This statement identified a requirement for maintaining an action against a municipality under section 1983. *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978). However, I believe the district court and the majority have misapplied the *Monell* "policy or custom" requirement in this case.

B.

In *Monell* the Supreme Court overruled *Monroe* v. *Pape*, 365 U.S. 167 (1961), insofar as it held that local governments are not among the "persons" to which 42 U.S.C. § 1983 applies. In holding that municipalities may be sued directly under § 1983 the *Monell* Court limited liability to those situations where a local government acts pursuant to "official policy" or governmental "custom." It made clear, however, that a "custom" need not have received formal approval of the decision-making authority of the municipality. On the other hand, the Supreme Court determined that a local government may not be held liable under § 1983 based on a *respondeat superior* theory for simply having an employee who commits a wrong. *Id.* at 690-95. The Court stated in *Monell* that it did not address "what

the full contours of municipal liability under § 1983 may be." *Id.* at 695.

The Supreme Court has continued to explore the contours of municipal liability since *Monell*. *E.g.*, *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (an action of city council rendered municipality liable); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) (same); *Oklahoma City* v. *Tuttle*, 471 U.S. 808 (1985) (existence of municipal policy of inadequate training may not be inferred from misconduct of a single police officer); *Pembaur* v. *City of Cincinnati*, ___ U.S. ___, 106 S. Ct. 1292 (1986) (municipality may be liable for single act taken subject to a course of action directed by those who establish governmental policy). The consistent theme through all decisions since *Monell* is that municipal liability under § 1983 attaches only to acts of a municipality as distinguished from acts of municipal employees. Liability does not require a formal act of the governing body of the municipality; it may be based on actions of other officials "whose acts or edicts may fairly be said to represent official policy." *Pembaur*, 106 S. Ct. at 1298-99, quoting *Monell*, 436 U.S. at 694.

The district court misapplied *Monell* and its progeny in this case. Pilarowski was terminated pursuant to an action of the ultimate governing authority of Macomb County, its Board of Commissioners. There could be no doubt that this was an act of the county, not that of an employee. Liability did not depend upon a finding that the county had adopted a policy of suppressing free speech. Only four members of the Court in *Pembaur* agreed on the authority that a "policymaker" must possess when municipal liability is predicated on the single act of such an official. However, six Justices agreed to this statement:

> No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a

> single decision by its properly constituted legislative body — whether or not that body had taken similar action in the past or intended to do so in the future — because even a single decision by such a body unquestionably constitutes an act of official government policy.

106 S.Ct. at 1298 (citations omitted). *Pembaur* teaches that the acts of a properly constituted legislative body necessarily reflect official government policy. It is only when an alleged constitutional violation is caused by the conduct of a municipal employee that a separate inquiry into the existence of a municipal policy or custom is necessary in order to determine whether the act of the employee can be properly attributed to the municipality itself. Under this test, the single act of the Macomb County Board of Commissioners "unquestionably constitute[d] an act of official government policy."

The district court erred in requiring plaintiff to demonstrate the existence of an unconstitutional custom or policy where the claimed deprivation of First Amendment rights was based on an act of the legislative body of the county. This case is similar in many respects to *Williams* v. *City of Valdosta*, 689 F.2d 694 (11th Cir. 1982), where the court reversed the district court's entry of judgment notwithstanding the verdict. In *Williams* the court of appeals applied *Monell* in a manner that anticipated the Supreme Court's decision in *Pembaur*.

Since I believe that the district court's erroneous view of *Monell* was the sole basis for granting the defendants' motion for judgment notwithstanding the verdict, I would reverse the judgment of the district court and remand with directions to reinstate the verdict unless that court determines, upon reexamination of the issue, that it erroneously denied the defendants' motion for summary judgment on collateral estoppel grounds.

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed December 21, 1987)

(JOHN PILAROWSKI, Plaintiff-Appellant, v. MACOMB COUNTY HEALTH DEPT. and MACOMB COUNTY BOARD OF COMMISSIONERS, Defendants-Appellees — No. 86-1423; ON APPEAL from the United States District Court for the Eastern District of Michigan)

Before: LIVELY, Chief Judge,
WELLFORD, Circuit Judge,
and CELEBREZZE, Senior Circuit Judge.

WELLFORD, Circuit Judge, delivered the opinion of the court, in which CELEBREZZE, Senior Circuit Judge, joined. LIVELY, Chief Judge, (pp. 13-16)* delivered a seperate dissenting opinion.

WELLFORD, Circuit Judge.

This is an employment discrimination case, brought pursuant to 42 U.S.C. § 1983, in which plaintiff claimed he was discharged for exercising his First Amendment right to freedom of speech. The jury returned a verdict in favor of plaintiff, but the district court set the verdict aside and entered judgment for the defendants.[1] In granting judgment notwithstanding the verdict, the district court found that plaintiff had failed to prove that his discharge was based on an unconstitutional custom or policy of suppressing free speech. Before submitting the case to the jury, however, the

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* [*Printer's Note*]: *Cf.* pp. A-29 – A-32, *infra*.

[1] The parties stipulated that Macomb County is actually the only defendant. (See plaintiff's brief, footnote one.)

district court denied the defendants' motion for summary judgment. Defendants maintained in the motion for summary judgment that an administrative adjudication of the Michigan Employment Relations Commission precluded further inquiry into the reasons for Pilarowski's discharge under collateral estoppel principles.

I.

Some five years after being employed as an administrative assistant in the Macomb County Health Department, plaintiff began writing "letters to the editor," which were published in several local newspapers. Many of the letters were critical of actions taken by the Macomb County Board of Commissioners, the governing body of the county which controlled the health department funding. In January 1975 Dr. Leland Brown, Pilarowski's immediate supervisor, advised him to stop writing the critical letters to the papers, but Pilarowski continued to do so. On July 28, 1976, Dr. Brown discharged plaintiff for writing the letters. Plaintiff brought suit in state court and ultimately was ordered reinstated with back pay and benefits. *Pilarowski* v. *Brown*, 76 Mich. App. 666, 257 N.W.2d 211 (1977). After plaintiff returned to work, Dr. Brown resigned. Plaintiff continued sending faultfinding letters to the newspapers.

After his reinstatement plaintiff apparently assumed additional responsibilities under a series of temporary administrators of the health department. In 1978 the State of Michigan enacted a new public health code that required an extensive restructuring of the health services in Macomb County. M.C.L.A. 333.1101 *et seq.* The new code made significant changes in the method and amount of state funding for the county health department, requiring Macomb County to fund large portions of its health-related expenditures that formerly

had been provided by automatic state disbursements. In January 1978 Macomb County created an umbrella agency, Health Services Administration (HSA), to centralize administration of both the county health department and its department of mental health. In creating HSA the county sought to strengthen administrative resources of the health department generally, and to provide the means for compliance with additional reporting requirements of the new code. Plaintiff was an unsuccessful applicant for the position of director of HSA. Over the next four years several new administrative positions were created within HSA and filled by persons other than Pilarowski. At trial, plaintiff contended that some of these positions were created to reduce his responsibilities. Plaintiff continued to write the same type of letters to the editor during this period of transition.

In 1981 plaintiff was a member of his union's bargaining committee as the union and the county worked on a collective bargaining agreement. The county contended that there was an agreement for a news blackout by publishing another letter to the editor. Plaintiff maintained that there had been no such agreement at the time of the publication and that the county's negotiator had attempted to impose the blackout for the sole purpose of stopping his letter writing.

One of the Commissioners, Dilber, testified that a considerable time after the labor negotiations had concluded in December of 1981, he overheard an informal discussion between two other Commissioners, Beck [*sic*, Back] and Grove, (the only discussion he had ever heard concerning Pilarowski) indicating that the Health Department "hasn't gotten rid of Pilarowski yet," but "there were ways to work this out." Both Beck and Grove denied that such a conversation ever took place.

In August 1982 the director of HSA proposed several reductions in staff to avoid a projected budget deficit in the Department of Health. If it occurred, such a deficit would violate state law, and the Health Department had exhausted its reserve of general funds. The Macomb County Board of Commissioners adopted the director's recommendation for a reduction in the budget, necessitating lay-offs.

The Health Department was not the only branch of county government at the time affected by the budget crisis and the need for reduction in staff. During the prior year (1981-1982) 32 positions were eliminated in the Health Department. In August of 1982 by a vote of 16 to 9, the Commissioners adopted a revised budget whereby a number of Health Department positions were designated for lay-offs.[2] No names of any specific individuals in the department were mentioned in the motion to adopt an amended budget that would require lay-offs in the Health Department. Plaintiff was the only administrator in the Health Department subjected to this lay-off; the other affected employees were dentists and dental assistants. The budgetary action of the Commissioners, however, did not name Pilarowski as a person to be eliminated by reason of the reduction in force.

Within a few months after Pilarowski was terminated, HSA was abolished, and "plaintiff's position was never reconstituted . . . four or five people [are now] performing the tasks" which in whole or a [*sic*] part had been assigned to plaintiff. (Plaintiff's brief, p. 15). Before commencing the present action in district court plaintiff appealed his discharge to the Michigan Employ-

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[2] Commissioner Dilber (plaintiff's witness) voted for the budget adjustment and consequent lay-off requirement. Commissioner Grove voted against the reduction.

ment Relations Committee (MERC). Following a hearing, MERC rendered a decision finding that plaintiff was not terminated because of his union activities, and noted that the county had shown legitimate budgetary concerns as a basis of its actions. Among other findings, the administrative law judge found that "[t]he record establishes that there was a need for economy on the part of the County . . . an absence of evidence of animosity towards [Plaintiff] . . . the elimination of [Plaintiff's position] was the result of County reorganization . . . [and] it is inconceivable that the County Board of Commissioners undertook extensive reorganization . . . as a pretext in order to eliminate [Plaintiff]." Plaintiff did not challenge the findings of the ALJ or appeal the MERC decision to the Michigan state courts as he was permitted to do under Michigan procedure.

In addition, plaintiff grieved his discharge under provisions of the collective bargaining agreement with Macomb County. The arbitrator found that the economic reasons given for plaintiff's discharge were authentic and reasonable and that there was no evidence to support Pilarowski's claim that he was terminated for exercising his First Amendment rights. At the arbitration hearing the argument presented by plaintiff was that he had been intentionally discharged through a "concerted effort by the Employer to get rid of him *for his letter writing* and union activity." J/A 297. Proof of both activities, including the alleged brief discussion between Commissioner Beck and Commissioner Grove about getting rid of Pilarowski more than a year and a half before the termination occurred, was presented to the arbitrator. The collateral estoppel argument presented by defendants rested on their claim that the unappealed MERC decision precluded further litigation with respect to the good cause basis for plaintiff's discharge, and that this was further supported by the find-

ings of the arbitrator that there was good cause for the discharge not related to Pilarowski's letter writing and statements made during prior labor negotiations.

II.

Whether or not we adopt defendants' argument that plaintiff should be collaterally estopped from pursuing his claim of an improper discharge because of his letter writing activities, we find (as did MERC and the arbitrator) that the proof in this case is insufficient to establish that plaintiff's First Amendment activities were established as a cause of his termination by the Macomb County Commissioners. Assuming that the alleged conversation did in fact take place between Beck and Grove, two of the twenty-five commissioners, more than a year and a half before the termination took place, there is uncontradicted proof that budget constraints and cutbacks were necessary and mandated in the Health Department and many other departments of Macomb County in August of 1983, and that the Commissioners took budgetary action without specific reference to the individuals who would be affected by the necessary budget reductions. One of the two commissioners alleged to be attempting to "get rid" of plaintiff voted against the reduction ordered. The policy action taken by the County Board of Commissioners, then, was to reduce the budget without specific reference to plaintiff. In order for the Board of Commissioners to be liable for the discharge, plaintiff must present credible proof that the decision to discharge him was made "by reason of his exercise of constitutionally protected First Amendment freedoms." *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 283-84 (1977); *see also Perry* v. *Sindermann*, 408 U.S. 593, 597-98 (1972). Plaintiff must, indeed, go further and carry the burden to establish that his "conduct was a 'substantial factor'

— or, to put it in other words, that it was a 'motivating factor' in the Board's decision. . . ." *Mt. Healthy*, 429 U.S. at 287 (footnote omitted). We are satisfied that the record fails to support plaintiff's contention as to the causation factor in this case with respect to the County Board's decision. Pilarowski's evidence, given a favorable construction, was insufficient to demonstrate that the County Board possessed the improper motive alleged when it approved the necessary budget cuts affecting the Health Department.[3]

The Supreme Court has determined that a local government may not be held liable under § 1983 based upon a *respondeat superior* theory simply for having an employee or employees who may commit a wrong. *See Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 691 (1978). We accordingly conclude that the district court was not in error in granting defendant's motion for judgment notwithstanding the jury verdict. We reach this conclusion after reviewing the evidence in the light most favorable to the plaintiff, including the evidence of the previous successful state court suit brought by Pilarowski against the County, his failure to attain promotions, removal or reassignment of some of his job responsibilities, and the proof concerning alleged adverse feelings and expressions of several Macomb County officials directed against plaintiff.

The district court found that plaintiff had presented proof that "certain individuals who were not named as

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[3] It may be, although it is not necessary for us to decide this issue, that certain individuals associated with defendant Macomb County may have acted with the requisite improper animus with respect to Pilarowski's termination. Plaintiff's evidence was insufficient to establish, however, that Health Department officials Hill and/or Lafferty were acting as employment policymakers for Macomb County. *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 483 n. 12 (1986).

defendants" may have been motivated to terminate his employment by reason of his letter writing activities, but that they had not been the policymakers who might bind the defendant County by reason of their actions under *Monell*.[4] The district court also cited *Bennett* v. *Slidell*, 728 F.2d 762, 767 (5th Cir. 1984), *reh'g denied*, 735 F.2d 861 (1984), *cert. denied*, 472 U.S. 1016 (1985), in support of this ruling that the injury suffered (the termination) was not shown to be "fairly attributable to the government itself," and that Macomb County could not be held liable under "a *respondeat superior* theory of liability." He concluded that it had not been demonstrated by the plaintiff that the commissioners, who were the County policymaking body, had delegated to any employee in the Health Department such authority with respect to termination of any given individual within that department, including Pilarowski.

We find no error in this aspect of the district court's decision, which we interpret to hold that evidence of action taken by an individual non-policymaking supervisor (not a defendant) was not to be considered the act of the defendant in this case. Pilarowski thus was held to have failed to establish the requisite causal link between his First Amendment activities and the action taken by the named defendant, the Macomb County Board of Commissioners. See *Mt. Healthy, supra*, and *Monell, supra*. In our view the record does not support the claim that defendant Board used the budget cuts as a subterfuge to violate Pilarowski's constitutional rights.

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[4] "Some individual Macomb County employees," the district court found, "were offended by Mr. Pilarowski's letter writing activities and seemingly sought to have his employment with the Health Department terminated."

Even if the district court's decision were properly interpreted, as indicated by the dissent, to suggest that there was sufficient evidence to support a conclusion that defendant Board, not unnamed individuals within the Health Department, placed plaintiff on indefinite lay-off on a pretextual basis, a different result would not be mandated. In our view, the dissent's interpretation is not the correct one,[5] but we would affirm the judgment notwithstanding the verdict even if we were to accept that interpretation. As previously indicated, we find that the record simply is insufficient to support a conclusion that *the Board's action* in question in adopting budget cuts was motivated by Pilarowski's letter writing activity, or that a desire to "get rid" of him was a substantial factor or a causative factor in the Board's decision.

> If a lower court's judgment is proper, this court can affirm, even if the court's decision was based upon an incorrect application of law. *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 n. 6 (1970); *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937).

United States v. *Bank of Salina*, (6th Cir. No. 85-5050, unreported, February 25, 1986, n. 5), disposition noted at 786 F.2d 1166 (1986). *See also Stelos Co.* v. *Hosiery Motor-*

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[5] The district court concluded, among other things:

> Having carefully examined this evidence, the Court finds that as a matter of law, it is insufficient to establish liability as against the County of Macomb. The plaintiff simply *failed to demonstrate any connection* between these events [firing in 1976; seeking to "silence" him; diminishing job responsibilities; and the Back-Grove December, 1971, discussion] and the Court is unwilling to assume such a relationship.

(Emphasis added). The district court also pointed out the "*unrelated actions* of a limited number of individual employees" in denying *respondeat superior* liability against the County. (Emphasis added).

Mend Corp., 295 U.S. 237 (1935). *See Neely* v. *Martin K. Eby Const. Co.*, 386 U.S. 317 (1967); *Howes* v. *Great Lakes Press Corp.*, 679 F.2d 1023, 1029 (2d Cir. 1982), *and compare Cansler* v. *Grove Manufacturing Co.*, 826 F.2d 1507 (6th Cir. 1987), as to this court's authority to direct or to approve granting of JNOV.

III.

We therefore find no error in the reversal of the jury verdict for insufficiency of proof with respect to the motivating cause of the budgetary cutback affecting Pilarowski. Furthermore, while we do not find it necessary to decide the collateral estoppel issue raised by defendants, we are persuaded that defendants' argument in this respect has considerable merit.

Plaintiff, in the process of presenting his charge to MERC that defendants were guilty of a violation of the employment agreement, presented evidence of claimed hostility towards him and that the budget crisis and reorganization of the Health Department constituted a pretextual basis for his discharge. The ALJ found in considering plaintiff's charge of wrongful termination that there was a genuine economic necessity for cutbacks and an "absence of animosity" towards Pilarowski. Plaintiff did not appeal this administrative finding under the MERC process. The findings that no contractual violation occurred, that just cause for Pilarowski's discharge existed, and that the discharge did nor arise out of animosity, being unappealed, may establish a basis for the preclusive effect of such a decision. *See Senior Accountants, Analysts & Appraisers Association* v. *City of Detroit*, 399 Mich. 449, 458, 249 N.W.2d 121, 124-25 (1976).

In addition, plaintiff filed a grievance over his discharge and pursued it to arbitration. Here again, in arbitration plaintiff went into his letter writing procliv-

ity, his feeling that county officials resented this activity and were therefore hostile towards him, and that this hostility brought about an improper discharge based upon exercise of his constitutional rights. The arbitrator characterized plaintiff's claim as being that his "layoff was discriminatory and punitive" by reason of the exercise of his freedom to make public his criticism of Macomb County officials and their policies. J/A 295. He relied upon the Dilber proof as well as the proof about animosity due to his union activity, which was the same proof presented to the jury in this case. Pilarowski relied on a claim of retaliation in his claim before the arbitrator. Defendants' position was that plaintiff had failed to prove that his layoff "was improper."

The arbitrator assumed that plaintiff's contentions about hostility may have had some basis, stating that "[f]rom the nature and extensiveness of the Grievant's letter-writing alone, it must be assumed that there was at least some level of negative feelings toward him in some quarters of the County administration." He decided, however, as we have concluded, that there was no "persuasive evidence" of "association," no causation demonstrated between any "negative feelings" toward Pilarowski and his layoff. While the arbitrator's decision may not constitute a bar to plaintiff's raising similar issues under § 1983, it strongly corroborates the state MERC decision, adverse to Pilarowski, which held the lay-off to be a justified action.

The collateral estoppel issue is properly before us even though defendants did not file a cross-appeal. They raised the issue in their motion for summary judgment and it may present an alternative ground in support of the district court judgment. *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435-36 (1924).

In denying the defendants' collateral estoppel-based motion for summary judgment, the district court relied principally on our decision in *Elliott* v. *University of Tennessee*, 766 F.2d 982 (6th Cir. 1985). In *Elliott* we held that unreviewed state administrative determinations should not be given a preclusive effect in subsequent § 1983 actions. The Supreme Court reversed this holding in *University of Tennessee* v. *Elliott*, ___ U.S. ___, 106 S. Ct. 3220 (1986). Although agreeing that unreviewed state administrative determinations do not preclude a trial de novo of Title VII claims in federal court, the Supreme Court concluded that such determinations may preclude a second trial of the same issues in federal court where the claims are based on the Reconstruction of Civil rights statutes, including § 1983. Resolution of this issue turns on the preclusive effect to which the determination would be entitled in the appropriate state courts. 106 S. Ct. at 3225-27.

The district court recognized that the Michigan Supreme Court had held in *Senior Accountants, Analysts & Appraisers Ass'n* v. *City of Detroit*, 399 Mich. 449, 249 N.W.2d 121 (1976), that unreviewed factual determinations by MERC are entitled to preclusive effect when an action in a state court rests on the same questions of fact. However, the district court felt that this court's *Elliott* decision required a different rule when the subsequent action is brought in federal court.

The district court did not have the benefit of the Supreme Court's decision in *Elliott* or the decision in *Polk* v. *Yellow Freight System, Inc.*, 801 F.2d 190 (6th Cir. 1986), when it denied the defendants' motion for summary judgment. In *Polk* we ruled that federal courts must apply *Senior Accountants* and other Michigan cases dealing with collateral estoppel-based preclusion. *Id.* at 193-94.

Had we not decided that the grant of judgment notwithstanding the verdict was warranted for the reasons heretofore stated, we would have been called upon to effect a remand so that the district court might have reconsidered the collateral estoppel issue in light of the authorities and reasons set herein set out.

We AFFIRM the judgment of the district court for defendants.

LIVELY, Chief Judge, dissenting.

Since I believe the majority has seriously misapplied an important rule of law, I respectfully dissent.

A.

The majority concludes that there was insufficient evidence that Pilarowski's "First Amendment activities were established as a cause of his termination by the Macomb County Commissioners." *Ante* p. [A-22 *]. However, that was not the basis of the district court's granting the defendants' motion for judgment notwithstanding the verdict. The district court specifically found that there was sufficient evidence "to support the conclusion that defendants' argument that plaintiff was placed on indefinite layoff due to a budget deficit was pretextual and that plaintiff would not have been fired but for his letter writing activities." Joint Appendix at 209E. The motion for judgment notwithstanding the verdict was granted because the plaintiff chose to sue only the county rather than individual members of the Board of Commissioners or Health Department and, in doing so, failed to "identify the existence of a governmental policy and connect that

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* [*Printer's insertion*].

policy to the particular injuries which he suffered." *Id.* This statement identified a requirement for maintaining an action against a municipality under section 1983. *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978). However, I believe the district court and the majority have misapplied the *Monell* "policy or custom" requirement in this case.

B.

In *Monell* the Supreme Court overruled *Monroe* v. *Pape*, 365 U.S. 167 (1961), insofar as it held that local governments are not among the "persons" to which 42 U.S.C. § 1983 applies. In holding that municipalities may be sued directly under § 1983 the *Monell* Court limited liability to those situations where a local government acts pursuant to "official policy" or governmental "custom." It made clear, however, that a "custom" need not have received formal approval of the decision-making authority of the municipality. On the other hand, the Supreme Court determined that a local government may not be held liable under § 1983 based on a *respondeat superior* theory for simply having an employee who commits a wrong. *Id.* at 690-95. The Court stated in *Monell* that it did not address "what the full contours of municipal liability under § 1983 may be." *Id.* at 695.

The Supreme Court has continued to explore the contours of municipal liability since *Monell*. *E.g.*, *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (an action of city council rendered municipality liable); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) (same); *Oklahoma City* v. *Tuttle*, 471 U.S. 808 (1985) (existence of municipal policy of inadequate training may not be inferred from misconduct of a single police officer); *Pembaur* v. *City of Cincinnati*, ___ U.S. ___, 106 S. Ct. 1292

(1986) (municipality may be liable for single act taken subject to a course of action directed by those who establish governmental policy). The consistent theme through all decisions since *Monell* is that municipal liability under § 1983 attaches only to acts of a municipality as distinguished from acts of municipal employees. Liability does not require a formal act of the governing body of the municipality; it may be based on actions of other officials "whose acts or edicts may fairly be said to represent official policy." *Pembaur*, 106 S. Ct. at 1298-99, quoting *Monell*, 436 U.S. at 694.

The district court misapplied *Monell* and its progeny in this case. Pilarowski was terminated pursuant to an action of the ultimate governing authority of Macomb County, its Board of Commissioners. There could be no doubt that this was an act of the county, not that of an employee. Liability did not depend upon a finding that the county had adopted a policy of suppressing free speech. Only four members of the Court in *Pembaur* agreed on the authority that a "policymaker" must possess when municipal liability is predicated on the single act of such an official. However, six Justices agreed to this statement:

> No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body — whether or not that body had taken similar action in the past or intended to do so in the future — because even a single decision by such a body unquestionably constitutes an act of official government policy.

106 S. Ct. at 1298 (citations omitted). *Pembaur* teaches that the acts of a properly constituted legislative body necessarily reflect official government policy. It is only when an alleged constitutional violation is caused by

the conduct of a municipal employee that a separate inquiry into the existence of a municipal policy or custom is necessary in order to determine whether the act of the employee can be properly attributed to the municipality itself. Under this test, the single act of the Macomb County Board of Commissioners "unquestionably constitute[d] an act of official government policy."

The district court erred in requiring plaintiff to demonstrate the existence of an unconstitutional custom or policy where the claimed deprivation of First Amendment rights was based on an act of the legislative body of the county. This case is similar in many respects to *Williams* v. *City of Valdosta*, 689 F.2d 694 (11th Cir. 1982), where the court reversed the district court's entry of judgment notwithstanding the verdict. In *Williams* the court of appeals applied *Monell* in a manner that anticipated the Supreme Court's decision in *Pembaur*.

Since I believe that the district court's erroneous view of *Monell* was the sole basis for granting the defendants' motion for judgment notwithstanding the verdict, I would reverse the judgment of the district court and remand with directions to reinstate the verdict unless that court determines, upon reexamination of the issue, that it erroneously denied the defendants' motion for summary judgment on collateral estoppel grounds.

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Issued April 9, 1986)

(JOHN PILAROWSKI, Plaintiff, -vs- MACOMB COUNTY HEALTH DEPARTMENT and MACOMB COUNTY BOARD OF COMMISSIONERS, Defendants — CIVIL ACTION NO. 83-9064)

At a session of said Court held in the Federal Building, Port Huron, Michigan on the 9th day of April, 1986.

PRESENT: HONORABLE JAMES HARVEY,
United States District Judge.

This case is now before the Court on defendants' motion for a judgment notwithstanding the verdict. The question raised by defendants' motion is whether the proofs introduced into evidence at trial by plaintiff are sufficient, as a matter of law, to support a verdict against the County of Macomb. Specifically, defendants' motion raises the question of whether plaintiffs' proofs were adequate to support a finding that plaintiff's employment with the Macomb County Health Department was terminated pursuant to an unconstitutional custom or policy of Macomb County of suppressing constitutionally protected speech. Having carefully considered the arguments of the parties regarding this issue, the Court finds that, as a matter of law, plaintiff's proofs were insufficient to support a verdict against the County of Macomb and therefore grants defendants' motion for a judgment notwithstanding the verdict.

A.
FACTUAL BACKGROUND

Plaintiff John Pilarowski is a resident of Macomb County, Michigan who has worked for the Macomb County Health Department as an administrative assistant on two occasions. Mr. Pilarowski was initially employed by the Health Department from 1969 to 1976. During that time, the plaintiff offended various members of the Macomb County Board of Commissioners and his supervisor, Dr. Brown, by writing numerous letters to local newspapers criticizing various local governmental officials. In 1976, Mr. Pilarowski's employment with the Health Department was terminated. *See Pilarowski* v. *Brown*, 76 Mich. App. 666 (1977).

Following his firing, Mr. Pilarowski sued Dr. Brown and the Macomb County Health Department claiming that his employment had been unconstitutionally terminated in response to his letter writing activities. The Michigan Court of Appeals agreed with the plaintiff and in 1977 ordered Mr. Pilarowski reinstated in his job at the Health Department. *Id.*

Mr. Pilarowski returned to work in 1977 but, nevertheless, continued his letter writing activities. Mr. Pilarowski remained in his job until September 15, 1982 when he was placed on indefinite layoff. Plaintiff's placement on indefinite layoff came about when the Board of Commissioners voted to approve various budget cuts in order to cure a projected deficit of $315,000.00. These budget cuts were recommended to the Board of Commissioners by Mr. Hill and Mr. Lafferty of the Health Department. The evidence presented by the plaintiff does not reveal either that the Board of Commissioners as a whole was aware that plaintiff's job in particular would be affected or that the

Board took this action to silence the plaintiff. The record would support a finding that Mr. Lafferty, Mr. Hill and perhaps Commissioners Grove and Back individually desired to have the plaintiff fired because of the plaintiff's letter writing activities. Nevertheless, their objective was not shared by the Board of Commissioners as a whole.

Believing that he had been fired again in response to his letter writing activities, the plaintiff initiated this suit. The case was tried to a jury which returned a verdict in plaintiff's favor in the amount of $301,000.00.

B.
LEGAL STANDARD

The standard for granting a judgment notwithstanding the verdict is the same as for granting a motion for a directed verdict.

> The issue raised by a motion for a judgment n. o. v. is whether there is sufficient evidence to raise a question of fact for the jury. *O'Neil* v. *Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975). This determination is one of law to be made by the trial court in the first instance. *Id.* In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor. *See Gillham* v. *Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913, 96 S.Ct. 1113, 47 L.Ed.2d 318 (1976). If, after thus viewing the evidence, the trial court is of the opinion that it points so

> strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted. *Id.* at 109; *Reeves* v. *Power Tools, Inc.*, 474 F.2d 375, 380 (6th Cir. 1973); 9 Wright & Miller, *Federal Practice and Procedure* § 2524 (1971). An appellate court when reviewing the trial court's decision is bound by the same standard. *Gillham* v. *Admiral Corp., supra*, 523 F.2d at 109; *O'Neil* v. *Kiledjian, supra*, 511 F.2d at 513.

Morelock v. *NCR Corp.*, 586 F.2d 1096, 1104-05 (6th Cir. 1978), *cert. denied* 441 U.S. 906 (1979). *See also Phillips* v. *Hardware Wholesales Inc.*, 762 F.2d 46 (6th Cir. 1985); *Bellamy* v. *Bradley*, 729 F.2d 416 (6th Cir. 1984), *cert. denied* 83 L.Ed.2d 93 (1984); and *Pike* v. *Benchmaster Mfg. Co.*, 696 F.2d 38 (6th Cir. 1982).

C.

42 U.S.C. § 1983

In order for a plaintiff who alleges that he has been dismissed from his employment with a municipality because he has exercised constitutionally protected freedoms to prevail in a Section 1983 suit, the three-part test of *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U.S. 274 (1977) must be satisfied. *Mt. Healthy* first requires a plaintiff to establish that the conduct engaged in was constitutionally protected. Second, the plaintiff must establish that the exercise of that constitutionally protected freedom was a motivating factor in the decision to terminate his employment. If the plaintiff is able to carry his burden of proof on these two issues, the burden then shifts to the defendant to show that it would have reached the same decision as to plaintiff's employment even in the absence of the protected conduct. *Id.* at 287.

Assuming that a plaintiff is able to demonstrate the *Mt. Healthy* elements, he must overcome one final hurdle if he wishes to recover against the municipal entity itself. In such cases, the plaintiff must establish that the actions which were taken to terminate his employment was taken pursuant to a custom or policy of the municipality. *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978).

D.
THE INSTANT CASE

In the present case, the Court believes that a sufficient factual basis exists to support a finding by the jury that the plaintiff met his burden of proof under *Mt. Healthy as against certain individuals who were not named as defendants*. Clearly, plaintiff's letter writing activity constituted a constitutionally protected activity. Moreover, despite defendants' arguments to the contrary, sufficient evidence exists in the record to support a finding that some individual Macomb County employees were offended by Mr. Pilarowski's letter writing activities and accordingly undertook to have his employment with the Health Department terminated. Similarly, sufficient evidence exists to support the conclusion that defendants' argument that plaintiff was placed on indefinite layoff due to a budget deficit was pretextual and that plaintiff would not have been fired but for his letter writing activities. All of this evidence, however, is insufficient to overcome the fact that the plaintiff chose to sue only Macomb County and no individual members of the Board of Commissioners or Health Department.

Where a plaintiff chooses to sue a municipality for the alleged deprivation of a constitutional right, it is incumbent upon the plaintiff to identify the existence

of a governmental policy and connect that policy to the particular injuries which he has suffered. *Bennett* v. *City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984), *reh'g denied* 735 F.2d 861 (1984), *cert. denied* 87 L.Ed.2d 612 (1985). Succinctly, the injury suffered by the plaintiff must be fairly and directly attributable to the government itself. A local governmental body cannot be held responsible for the actions of its individual employees under 42 U.S.C. § 1983 on a *respondeat superior* theory of liability. *Monell*, 436 U.S. at 694.

> The Supreme Court in *Monell* expressly stated that the city policy, for which the city may suffer liability, may be made by city lawmakers "or by those whose edicts or acts may fairly be said to represent official policy." We do not read the Court's words here to declare that any city official's edicts or acts would render the city liable in any case where a fact finder chose to say, speaking fairly, that the edicts or acts were official policy. The Court intended there to be a legal perimeter for city liability, which was not to include responsibility for edicts or acts of its employees, whatever their rank, unless in accord with city policy. Liability must rest on official policy, meaning the city government's policy and not the policy of an individual official. The policy is that of the city, however, where it is made by an official under authority to do so given the governing authority. Hence, culpable policy is attributable to the governing body of the city where the policy was made by an official to whom the governing body had given policymaking authority.
>
> But policymaking authority is more than discretion, and it is far more than the final say-so,

> as a matter of practice, on what water main will be replaced today and whether a building meets city construction standards. City policymakers not only govern conduct; they decide the goals for a particular city function and devise the means of achieving those goals. Policymakers act in the place of the governing body in the area of their responsibility; they are not supervised except as to the totality of their performance.

Bennett, 728 [*F.2d*] at 768-69.

In the present case, plaintiff's claim against Macomb County fails because the plaintiff failed to establish that the Board of Commissioners had a policy of suppressing free speech or that the Board delegated significant policymaking authority to any single individual who had such a policy. That plaintiff might well have succeeded in an action against various individuals does not establish liability as against the City of Macomb.

In answer to defendants' motion for a judgment notwithstanding the verdict, the plaintiff points to five facts which he argues prove that Macomb County itself had a policy of suppressing free speech. First, plaintiff points to his firing in 1976. Second, plaintiff argues that Macomb County sought to silence him by imposing a news blackout on various collective bargaining negotiations during the early 1980's. Third, plaintiff argues that his job responsibilities were substantially diminished following his reinstatement in 1976. Fourth, plaintiff points to the testimony of Commissioner Dilber who overheard Commissioners Back and Grove discussing ways of indirectly getting rid of the plaintiff. Finally, the plaintiff offered the testimony of two witnesses who testified that they were afraid of expressing certain opinions for fear of retaliation.

Having carefully examined this evidence, the Court finds that, as a matter of law, it is insufficient to establish liability as against the County of Macomb. The plaintiff simply failed to demonstrate any connection between these events and the Court is unwilling to assume such a relationship. In short, the Court believes that the plaintiff is improperly attempting to predicate governmental liability on the unrelated actions of a limited number of individual employees. This is classic *respondeat superior* liability and is permissible in an action against a municipality under 42 U.S.C. § 1983.

Accordingly, defendants' motion for a judgment notwithstanding the verdict is GRANTED. Judgment will therefore be entered in favor of the defendants. Plaintiff's motion for costs and attorney fees is DENIED AS MOOT.

IT IS SO ORDERED.

/s/ JAMES HARVEY
United States District Judge

JUDGMENT IN A CIVIL CASE
NOTWITHSTANDING THE VERDICT

CIV 31
(Rev. 5/83)

APR. 16, 1986

United States District Court
DISTRICT: Eastern District of Michigan

CASE TITLE: JOHN PILAROWSKI v. MACOMB COUNTY HEALTH DEPARTMENT and MACOMB COUNTY BOARD OF COMMISSIONERS; *DOCKET NUMBER:* 83-CV-9064-PH; *NAME OF JUDGE OR MAGISTRATE:* JAMES HARVEY

☒ *Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.*

IT IS ORDERED AND ADJUDGED

that defendants' motion for a judgment notwithstanding the verdict is hereby GRANTED. Judgment is hereby entered in favor of the defendants and plaintiff takes nothing.

CLERK: ROBERT A. MOSSING
(BY) DEPUTY CLERK: Barbara Heys

DATE: 4/14/86

JUDGMENT ON JURY VERDICT

(United States District Court —
Eastern District of Michigan)

(Filed September 24, 1985)

(JOHN PILAROWSKI, Plaintiff, vs MACOMB COUNTY HEALTH DEPARTMENT and MACOMB COUNTY BOARD OF COMMISSIONERS, Defendants — CIVIL ACTION FILE NO. 83-CV-9064-PH)

Civ 31
Rev 12/81

This action came on for trial before the Court and a jury. Honorable James Harvey, *United States District Judge, presiding.*

The issues having been duly tried and the jury having duly rendered its verdict, it is ordered and adjudged that plaintiff recover of defendants the sum of Three Hundred Thousand, One Dollars ($301,000.00).

Dated at Port Huron, Michigan, *this* 24th *day of* September, *1985.*

ROBERT A. MOSSING
Clerk of Court
By: /s/ Barbara Heys
Deputy Clerk

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed September 9, 1985)

(JOHN PILAROWSKI, Plaintiff, -vs- MACOMB COUNTY HEALTH DEPARTMENT AND MACOMB COUNTY BOARD OF COMMISSIONERS, Defendant[s] — CIVIL ACTION NO. 83-9064 PH)

At a session of said Court held in the Federal Building, Port Huron, Michigan on the 9th day of September, 1985.

PRESENT: HONORABLE JAMES HARVEY,
United States District Judge.

In the present action, the plaintiff alleges that the defendants violated his First Amendment right to free speech by terminating his employment with the Macomb County Health Department. Specifically, the plaintiff alleges that he was fired in response to a series of letters which he wrote to the editor of a local newspaper criticizing various local governmental officials. The Court now has before it the following motions:

(1) Defendants' Motion to Dismiss;
(2) Defendants' Motion for Summary Judgment; and,
(3) Defendants' Motion for a non-jury trial.

Defendants' first motion is a motion to dismiss for failure to state a claim for which relief can be granted and for failure to comply with this Court's Order of March 29, 1985. These motions have been brought pursuant to Federal Rules of Civil Procedure 12(b)(6) and 37(b)(2)(C). Notably, the plaintiff has failed to answer

defendants' motion to dismiss. The essence of defendants' motion is not so much an argument that plaintiff's complaint fails to allege a viable legal theory and attendant set of facts as it is that the plaintiff has failed to state, with the requisite specificity, the factual basis for his claim under 42 U.S.C. § 1983. To the extent that defendants' motion can be characterized as a prototypical Rule 12(b)(6) motion, the Court believes that it is more appropriate to treat it as a motion for summary judgment under Rule 56. *See, Windsor* v. *The Tennessean*, 719 F.2d 155 (6th Cir. 1983). Accordingly, the Court will incorporate those more traditional aspects of defendants' motion to dismiss into its discussion of defendants' motion for summary judgment.

The basis of defendants' motion to dismiss is an argument that plaintiff has failed to adequately answer various interrogatories submitted to him. As properly noted by defendants, this is the second time that this issue has come before the Court. In an Order dated March 29, 1985 the Court granted defendants' motion to compel and ordered the plaintiff to answer certain interrogatories. Having reviewed the record, the Court finds that while the plaintiff has submitted answers to those interrogatories, those answers are inadequate. Nevertheless, the Court does not believe that justice dictates that this action be dismissed under Rule 12(b)(6) or Rule 37(b)(2)(C). Rather, the Court hereby ORDERS the plaintiff to submit more detailed answers to interrogatories Nos. 1, 6, 11, 12, 13, and 14 before the start of trial.

Defendants' second motion is a motion for summary judgment brought pursuant to Federal Rule of Civil Procedure 56. Defendants argue that two separate bases exist which are sufficient to support a grant of summary judgment. Defendants first argue that no genuine

issue of material fact exists as to the issue of whether plaintiff's alleged injuries were occasioned by any unconstitutional custom or policy of the defendants. Defendants' second argument is that the plaintiff is collaterally estopped from introducing into evidence any testimony that his discharge was attributable to any factor other than budgetary considerations. The Court will begin its analysis of defendants' summary judgment motion by addressing the second of these bases.

Following his discharge, plaintiff filed a claim of unfair labor practices with the Michigan Employment Relations Commission ("MERC"). Plaintiff raised the same basic arguments before the MERC as he now raises before this Court in arguing that he had been discharged for his letter-writing activities. The Administrative Law Judge and the MERC found that the plaintiff had not been discharged for his letter writing activities and that "the record establishes that there was a need for economy on the part of the County in the operation of its Health Department." Defendants now argue that that factual finding is collateral estoppel as to the issue of whether the plaintiff was fired for his letter-writing activities or for budgetary reasons.

In *Allen* v. *McCurry*, 449 U.S. 90 (1980) and *Migra* v. *Warren City School Dist. Bd. of Ed.*, ___ U.S. ___, 104 S.Ct. 892, 79 L.Ed.2d. 59, n. 1 (1982), the Supreme Court held that the Full Faith and Credit Clause of the Federal Constitution, as implemented by 28 U.S.C. § 1738, requires federal courts to give *state court judgments* the same preclusive effect in a later Section 1983 action as it would be given under the law of the state in which the judgment was rendered. Defendants cite *Senior Accountants* v. *Detroit*, 399 Mich. 449 (1976) in

support of the proposition that Michigan would give the MERC decision such preclusive effect so as to estoppe the plaintiff from challenging the reason for his dismissal.

In *Senior Accountants*, the Michigan Supreme Court held that an MERC determination that the plaintiff claimants were not entitled to an award of back pay was binding in a later suit for damages in Michigan Circuit Court. *Id.* at 458-59. On the authority of *Senior Accountants*, defendants argue that this Court must hold that plaintiff is collaterally estopped from challenging the MERC's finding that he was fired for budgetary considerations and not because of his letter-writing activities.

Having reviewed this matter, the Court has concluded that the MERC determination is an administrative adjudication and not a state judicial proceeding within the meaning of 28 U.S.C. § 1738. The Court recognizes that this is a close question but nevertheless believes that this result is compelled by the decisions in *McDonald* v. *West Branch*, __ U.S. __, 104 S.Ct. 1799, 80 L.Ed.2d. 302 (1984) and *Elliott* v. *The University of Tennessee*, Docket No. 84-5692 (6th Cir. 1985). Even assuming that the MERC determination is a judicial proceeding within the meaning of 28 U.S.C. § 1738, the Court believes that affording unappealed MERC determinations preclusive effect in subsequent Section 1983 actions would seriously circumscribe the protections afforded by that civil rights statute. *See Elliott, supra.* "The legislative history and purpose of Section 1983, as explicated by the Supreme Court, is incompatible with application of a judicially fashioned rule of preclusion that would bind a court considering a Section 1983 claim to the unreviewed findings of a state administrative agency." Moreover, the Court believes that this

result is precisely what was intended by the Sixth Circuit in *Elliott*. The Court in *Elliott* held

> If the claimant prevails before the administrative agency, the defendant may appeal to the state courts and thus, pursuant to the rule in Allen, Migra and Kremer, preclude federal court intervention. If the claimant loses before the agency, the claimant may either pursue an appeal in the state courts or bring an action in federal court. The rule of non-preclusion maximizes the forum choices by encouraging the claimant to pursue administrative remedies when, if rules of preclusion were applicable, the claimant would forego the administrative adjudication and proceed immediately to federal court. *Id.*

Accordingly, the Court holds that the MERC determination that the termination of the plaintiff's employment was brought about by budgetary concerns has no collateral estoppel effect in the case now before the Court.

The second basis which defendants offer in support of their motion for summary judgment is a claim that no genuine issue of material fact exists as to the issue of whether any unconstitutional custom or policy of the defendants caused plaintiff's alleged injuries.

Summary judgment is appropriate where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. *Willets* v. *Ford Motor Co.*, 583 F.2d 852, 855 (6th Cir. 1978); F.R. Civ. P. 56(c). In applying this standard, the Court must review all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the party opposing the motion. *Arnett* v. *Kennedy*, 416 U.S. 134

(1974); *United States* v. *Diebold*, 368 U.S. 654 (1962); *Smith* v. *Hudson*, 600 F.2d 60 (6th Cir. 1979).

The instant case is somewhat unusual in that the plaintiff has chosen not to sue the individual Board members who allegedly terminated his employment. Accepting that the plaintiff has chosen to sue only the municipal defendants, the plaintiff must prove that the injuries that he allegedly suffered were brought about by some unconstitutional custom or policy of these defendants. *Monell* v. *New York Dept. of Soc. Ser.*, 436 U.S. 658 (1978). A municipal defendant may not be held liable on the basis of *respondeat superior. Id.* If the plaintiff is unable to prove any such custom or policy, his case must necessarily be dismissed.

Having reviewed the record in the present case, the Court is deeply concerned as to whether the plaintiff will be able to sustain his burden. Nevertheless, the Court must refrain from granting a motion for summary judgment if it finds that there was any substantial question of fact to be decided. In the present case, the Court believes that the plaintiff has alleged the existence of sufficient factual questions such that it would be improper to grant defendants' motion for summary judgment. Specifically, the Court believes that the plaintiff may be able to establish the existence of an unconstitutional custom or policy by demonstrating that the action taken against him was instituted by such high ranking governmental officials that it may be fairly characterized as the policy of the defendant County. Accordingly, the Court hereby DENIES defendants' motion for summary judgment. The defendants will be free, however, to make a motion for a directed verdict at the close of plaintiff's proofs if the evidence so warrants.

The final motion now before the Court is defendants' motion for a non-jury trial. The defendants argue that

because plaintiff's complaint does not contain a written demand for a jury trial they have not been served with proper notice of plaintiff's demand for jury trial and that the jury should be stricken. Defendants cite Federal Rules of Civil Procedure 38(d) in support of their motion. Having reviewed this matter the Court will DENY defendants' motion for a non-jury trial. The Court believes that the defendants have had adequate notice of the fact that the plaintiff wishes to try this matter to a jury and would point to the fact that plaintiff's complaint is captioned "Verified Complaint and Demand for Jury trial" and that the notices which this Court has sent out scheduling the various dates in this case have indicated that this was a jury trial. Accordingly, the Court DENIES defendants' motion to dismiss but ORDERS the plaintiff to submit more detailed answers to the interrogatories previously specified. Defendants' motion for summary judgment is DENIED and defendants' motion for non-jury trial is DENIED.

IT IS SO ORDERED.

/s/ JAMES HARVEY
United States District Judge

JUDGMENT

(United States Court of Appeals — Sixth Circuit)

(Filed March 15, 1988; Issued as Mandate April 14, 1988)

(JOHN PILAROWSKI, Plaintiff-Appellant, v. MACOMB COUNTY HEALTH DEPARTMENT, MACOMB COUNTY BOARD OF COMMISSIONERS, Defendants-Appellees — No. 86-1423)

Before: LIVELY, Chief Judge;
WELLFORD; Circuit Judge,
and CELEBREZZE, Senior Circuit Judge.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

Issued as Mandate: April 14, 1988

(*Certification Omitted*)

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed April 12, 1988)

(JOHN PILAROWSKI, Plaintiff-Appellant, v. MACOMB COUNTY HEALTH DEPARTMENT, ET AL., Defendants-Appellees — No. 86-1423)

Before: LIVELY and WELLFORD, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

PORTION OF JURY INSTRUCTIONS

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Proceedings of September 24, 1985)

* * *

(78) * * * In order to prevail on his claim under Title 42, United States Code, Section 1983, the burden is on the Plaintiff to establish each of the following elements by preponderance of the evidence.

First, that he was employed by the Defendant, Macomb County Health Department, and that he was laid off or fired from that employment.

Second, that the Defendants acted under color of law.

Third, that the Plaintiff would not have been placed on layoff or fired but for the fact that he chose to exercise his right of free speech by writing letters to various local newspapers.

Four, that the Plaintiff was deprived of his rights to free speech pursuant to a policy or custom of Macomb County of suppressing free speech.

Fifth, that the Defendants' acts or conduct proximately caused damage to the Plaintiff.

The first element which the Plaintiff must establish in order to prove his claim is that he was (79) employed by the Macomb County Health Department and he was laid off or fired from that employment.

The second element which Plaintiff must establish to prove his claim is that the Defendants acted under color [*of*] law.

Acts are done under color of law when government officials act or purport to act in the performance of their official duties.

The Plaintiffs and Defendants have agreed for purposes of this case that all of the actions by the Defendants were under color of law.

The third element which the Plaintiff must establish in order to prove his claim is that he would not have been laid off or fired but for the fact that he chose to exercise his right to free speech.

In order to sustain his burden on this element, the Plaintiff must show that he engaged in a Constitutional activity, and that the conduct was a motivating factor in the Defendant's decision to lay off or fire him.

If you find that the Plaintiff has carried that burden, the burden then shifts to the Defendants to prove by a preponderance of the evidence that it would have laid off or fired the Plaintiff even if he had not engaged in that Constitutionally protected activity.

(80) The mere fact that the Plaintiff was laid off or fired does not establish the Plaintiff's claim, even though you may feel that the discharge was unwarranted or unreasonable.

If you find, however, that the Defendants discharged the Plaintiff in order to suppress the Plaintiff's exercise of free speech or in reprisal for having exercised his free speech, then such layoff or firing would not be lawful.

A policy is made by lawmakers or by those whose edicts or acts may be fairly said to represent official policy.

I'll say again: policy is made by lawmakers or by those who[*se*] acts may be fairly said to represent official policy.

This does not mear. that any official's edicts or acts would render the government liable. Liability must rest on official policy, meaning the government's policy, and not the policy of an individual official.

Custom is a persistent or widespread practice or a systematic maladministration of the laws. Practices are

well settled and permanent, deeply embedded traditional ways of carrying out a formal or informal policy.

The fourth element which the Plaintiff must (81) establish in order to prove his claim is that Macomb County had a policy of suppressing free speech, and that the actions which were taken to lay off or fire him were taken as a result of that policy.

In order to establish this element, it is not enough that the Plaintiff prove that certain individual members of the Macomb County Board of Commissioners or Macomb County Health Department took action to have him laid off or fired in order to suppress his free speech.

Rather, the Plaintiff must prove that Macomb County had a policy of suppressing free speech, and that the actions which were taken to lay off or fire him were taken as a direct result of that policy.

The fifth element, the Plaintiff must establish that the Defendants' acts were a proximate cause of injury and subsequent damage to Plaintiff.

* * *

(2)

Supreme Court, U.S.
FILED
AUG 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-85

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN PILAROWSKI
Petitioner,

v.

MACOMB COUNTY
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT MACOMB COUNTY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether Macomb County can be held vicariously liable under 42 U.S.C. §1983 for approving a budgetary reduction which resulted in the economic layoff of several employees, including Petitioner where certain individuals who were non-policymakers and were non-parties to the action arguably had a personal animus toward Petitioner.

II.

Whether Petitioner can sustain a claim under 42 U.S.C. §1983 where he is collaterally estopped from challenging the neutral reason for his economic layoff.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

No. 88-85

JOHN PILAROWSKI,
Petitioner,

v.

MACOMB COUNTY,
Respondent.

RESPONDENT MACOMB COUNTY'S BRIEF IN OPPOSITION

Respondent Macomb County respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Sixth Circuit Court of Appeals decision. This case presents no special or important reasons justifying the grant of the petition and, therefore, does not satisfy the threshold considerations governing review on certiorari as set forth in Rule 17 of the Rules of this Court.

STATEMENT OF THE CASE

Petitioner commenced this employment discrimination action, pursuant to 42 U.S.C. §1983, against the Macomb County Health Department and the Macomb County Board of Commissioners (collectively "Macomb County") alleging that he had been discharged from the Health Department for exercising his First Amendment right to freedom of speech. The County has, at all times, asserted that Pilarowski, along with several other employees, was laid off due to a growing budgetary deficit at the Health Department and that the County Board of Commissioners, acting without knowledge of which individuals would be affected, voted to reduce budgetary expenditures.

Unlike Petitioner's Statement of the Case,[1] the procedural history and factual setting of this matter is succinctly and accurately set forth in the Sixth Circuit's Opinion appended to the Petition (Pet. App. A-1 - A-6).

REASONS FOR DENYING THE WRIT

1. This case, as aptly described by the district court and as affirmed by the Court of Appeals, is one where the Petitioner impermissibly pursued a "classic *respondeat superior* liability" theory against Macomb County (Pet. App. A-40).[2]

Now, in an effort to frame an issue worthy of Supreme Court review, Petitioner asserts that the decisions below improperly hinged upon the fact that the Board of Commissioners did not "formally acknowledge" that Macomb County had a policy of suppressing free speech (Pet. 14, 16) and that a majority of the Board of Commissioners acted "with knowledge" (Pet. 13, 22, 23) of the "nefarious purpose" of certain individuals. Such an effort miscasts the decisions below, exaggerates the record below and is nothing more than a last ditch effort to defend the tactical decision not to sue certain county officials individually.

It is not a matter of great disagreement that if a municipal policymaking body acted with the intent to knowingly curtail the constitutionally protected right of an individual whether formally or informally, then a §1983 action would lie. That is simply not the case here.

There is no evidence that the policymaking body of Macomb County — the Board of Commissioners — had any intent or design to curtail the Petitioner's First Amendment rights to

---

[1] Rather than setting forth a *concise* statement of the case, Petitioner attempts to re-argue the facts as presented on appeal to the Sixth Circuit (Pet. 4, fn. 2). In so doing, he omits facts (i.e., the impact of Michigan's new Public Health Code and the post-layoff administrative proceedings) and, in other instances, unjustifiably overstates other facts (i.e., the knowledge and awareness of Board members) material to the consideration of the questions presented.

[2] Petitioner has incorrectly reprinted the district court's Memorandum Opinion and Order to state that "*respondeat superior* liability . . . is permissible" rather than "impermissible" as in fact the district court's Opinion states (Pet. App. A-40).

freedom of speech when it voted to correct a budgetary deficit.[3] The budgetary reports prepared by Health Department administrators did not contain the names of the employees to be laid off, no commissioner requested the names of the individuals to be laid off, and the resolution approving the amended budget likewise contained no names of affected personnel (Pet. App. A-4, A-34 - A-35).

In support of his contention that the Board of Commissioners had "knowledge of" the alleged "nefarious purpose" of certain individuals, Petitioner, as he did below, relies upon a purported conversation between two Commissioners about "getting rid of" him which was allegedly overheard by a third Commissioner over eight months before the entire Commission considered the amended budget (Pet. App. A-3, A-39). There was no evidence presented that any of the remaining twenty-two Commissioners heard the purported conversation much less knowingly acted upon it. *See Pembaur* v. *City of Cincinnati,* 475 U.S. 469, 483 (1986) ("municipal liability under §1983 attaches where — and only where — a *deliberate* choice to follow a course of action is made") (emphasis added); *see* also, *Oklahoma City* v. *Tuttle,* 471 U.S. 808, 823 (1985) (" 'policy' generally implies a cause of action *consciously* chosen from among various alternatives") (emphasis added; footnotes omitted).

Similarly, the decisions below did not hinge upon whether there was a "formal acknowledgement" by the Board of Commissioners of an unconstitutional municipal policy.[4] The decisions below hinged upon Petitioner's inability to "present credible proof that the decision to discharge him was made 'by reason of his exercise of constitutionally protected First Amendment freedoms' " (Pet. App. A-6) . . . an insufficient record "to support a

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[3] On the contrary, Petitioner's witness, Commissioner Dilber, voted to approve the budget adjustment and, in essence, caused Petitioner's layoff whereas Commissioner Grove allegedly hostile to Petitioner, voted not to cut the existing budget and, in essence, to maintain Petitioner's position (Pet. App. A-4, fn 2).

[4] The Sixth Circuit decision is likewise not inconsistent with the results of those cases cited by Petitioner at pages 19-20 of the Petition. The common thread of all the cases upon which Petitioner relies is that each case is fact specific in its application of *Monell* v. *New York City Dept. of Social Services,* 436 U.S. 658 (1978).

conclusion that *the Board's action* . . . was motivated by Pilarowski's letter writing activity . . ." (Pet. App. A-9) (emphasis in original).

This case is simply one where Petitioner failed to sustain his burden of proof and rests upon its own peculiar facts. It presents no special or important matter requiring Supreme Court review.

2. The application of collateral estoppel presents an independent basis upon which this Court can deny the petition.

Following his layoff, Petitioner filed an unfair labor charge with the Michigan Employment Relations Commission (MERC) which afforded him an adversarial hearing before an administrative law judge. Petitioner was represented at that hearing, witnesses testified, exhibits received into evidence and a full record transcribed. The MERC administrative law judge rendered a decision in favor of Macomb County finding in part that "[t]he record establishes that there was a need for economy on the part of the County . . . an absence of evidence of animosity towards [Petitioner] . . . the elimination of [Petitioner's position] was the result of County reorganization . . ." (Pet. App. A-5). Petitioner did not challenge these findings nor appeal the MERC decision to the Michigan Court of Appeals as he had a statutory right to do under Michigan law.

Under Michigan law, an unappealed MERC decision has preclusive effect. *See Senior Accountants* v. *City of Detroit,* 399 Mich. 449, 249 N.W.2d 121 (1976). Respondent contended in the district court that the unappealed MERC decision had preclusive effect and collaterally estopped Petitioner from challenging the neutral reason (i.e., the Health Department's budgetary shortfall) for his layoff (Pet. App. A-44 - A-46). While Respondent's Motion for Summary Judgment was pending, the Sixth Circuit decided *Elliott* v. *University of Tennessee,* 766 F.2d 982 (6th Cir. 1985), holding that a state administrative decision unreviewed by a state court is not binding on a federal court considering a §1983 claim. Based on that decision, the district court denied Respondent's motion.

During the pendency of this action on appeal but before oral argument in the Sixth Circuit, this Court reversed the *Elliott* decision holding that "federal courts *must* give the [state]

agency's factfinding the *same preclusive effect* to which it would be entitled in the State's courts." *University of Tennessee* v. *Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 3227 (1986) (emphasis added; footnotes omitted). At oral argument, the panel, *sua sponte*, raised the issue of collateral estoppel and its application to the MERC decision, as discussed above, and requested supplemental briefs on the issue.

As explicitly recognized by the majority opinion and implicitly by the dissenting opinion below, the collateral estoppel argument has "considerable merit" in light of this Court's decision in *Elliott* (Pet. App. A-10 - A-13) and presents this Court with an independent rationale to deny Petitioner's application for a writ.

CONCLUSION

This case is one in which Petitioner simply failed to produce sufficient evidence to establish an alleged violation of 42 U.S.C. §1983. There is here presented no conflict with the decision of another Court of Appeals on the same matter, no important question of federal law which should be settled by this Court, and no conflict with applicable decisions of this Court. The instant case was properly decided upon its peculiar facts.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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